Supreme Court, U. S.
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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-1328

WANDA JUNE WEEKS;
Appellant,

VERSUS

THOMAS J. KLEPPE, Secretary of the Interior of the United States of America and Trustee for the Delaware Indian People; THE DELAWARE TRIBAL BUSINESS COMMITTEE; THE ABSENTEE DELAWARE TRIBE OF OKLAHOMA BUSINESS COMMITTEE; BRUCE MILLER TOWNSEND; NATHAN H. YOUNG; MARY TOWNSEND CROW; HENRY A. SECONDINE; Y. A. SCOTT; ARTHUR L. THOMAS; ALENE MARTINEZ; MYRTLE HOLDER; TOMMY HOLDER; LAWRENCE SNAKE; and CHARLES TAYLOR,

Appellees.

and

DOROTHY FRAZIER and RUTH RATTLER, on their own behalf and on behalf of all those similarly situated,
Appellants,

VERSUS

THOMAS J. KLEPPE, individually and in his capacity as Secretary of the Interior of the United States of America,
Appellee,

THE DELAWARE TRIBE OF INDIANS,
Intervenor.

JURISDICTIONAL STATEMENT

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In the
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OCTOBER TERM, 1975

No. .....

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Appellee,

THE DELAWARE TRIBE OF INDIANS,
Intervenor.

JURISDICTIONAL STATEMENT

THE OPINIONS BELOW

The decision of which review is sought herein was rendered on December 18, 1975, by the United States District Court for the Western District of Oklahoma, sitting as a three-judge panel, pursuant to 25 U.S.C. §2281, *et seq.*, in Western District of Oklahoma Cases No. CIV-73-586-E and CIV-74-368-D, consolidated. The decision ("Memorandum Opinion") is as yet unreported, but is reproduced at Appendix B hereto. A separate Judgment was likewise entered on the same date and is reproduced at Appendix A hereto. No motions for new trial were filed by any parties, but, pursuant to motions to modify the judgment, the trial court entered its Order on January 14, 1976, modifying the judgment. Such modification is reproduced at Appendix C hereto. A timely and proper Notice of Appeal, reproduced at Appendix F hereto, was filed with the Clerk of the United States District Court for the Western District of Oklahoma on January 16, 1976.

The District Court, on November 1, 1974, entered an Order which is unreported, but is reproduced at Appendix D hereto, in which it dismissed the United States as a party defendant and ordered that the two consolidated actions proceed as class actions and ordered appropriate notices thereof. Said Order was amended on November 4, 1974, which Amendment to Order is reproduced at Appendix E hereto. Notices by mail and by publication were duly given as provided in said order as amended and proof thereof made.

JURISDICTION

(1) This is an action for an injunction against the Secretary of the Interior to restrain him from distributing funds under two federal statutes and seeking a declaratory judgment that such statutes are unconstitutional for the reasons that they violate the Fifth Amendment Due Process and Fifth Amendment Just Compensation rights of the classes of which the Plaintiffs are representatives.

This action was brought in the District Court pursuant to the provisions of 28 U.S.C. §1331 and 5 U.S.C. §701, *et seq.*

(2) The judgment appealed from was entered on December 18, 1975, and the notice of appeal was filed on January 16, 1976, in the United States District Court for the Western District of Oklahoma.

(3) Jurisdiction is conferred on the Supreme Court by direct appeal from the three-judge District Court by 25 U.S.C. §1253.

(4) Cases in which this Court has exercised its appellate jurisdiction from three-judge District Courts involving allegations that Acts of Congress were unconstitutional because they involved classifications which were allegedly invidiously discriminatory and which were without the support of a rationale which was reasonably related to the legislative purpose for which such Acts were enacted include *United States Department of Agriculture* v. *Moreno*, 413 U.S. 528, 93 S.Ct. 2821, 37 L.Ed.2d 782 (1973); *Weinberger* v *Wiesenfeld*, 420 U.S. 636, 95 S.Ct. 1225, 43 L.Ed.2d 514 (1975) and *Frontiero* v. *Richardson*, 411 U.S. 677, 93 S.Ct. 1764, 36 L.Ed.2d 583 (1973). Cases in which this Court

exercised its jurisdiction on the ground that substantial questions were presented involving allegations that state statutes were unconstitutional because they involved classifications which were allegedly invidiously discriminatory and which were without the support of a rationale which was reasonably related to the legislative purpose for which such statutes were enacted include *Craig* v. *Boren, et al.*, No. 75-628 (1975) and *Reed* v. *Reed*, 404 U.S. 71, 92 S.Ct. 251, 30 L.Ed.2d 225 (1971).

(5) This action directly challenges the constitutionality of 25 U.S.C. §§1181-1186, Public Law 90-508, December 14, 1967, 81 Stat. 583 and 25 U.S.C. §§1291-1297, Public Law 92-456, §4, October 3, 1972, 86 Stat. 762. These statutes are reproduced in full in Appendices G and H hereto.

QUESTIONS PRESENTED

QUESTION NO. 1

Whether an Act of Congress providing for the distribution of Indian Claims Commission judgment funds to compensate for the diminution of a specific tribal fund violates the Fifth Amendment Due Process rights or the Fifth Amendment Just Compensation rights of present descendants of the tribe who (a) suffered a loss by such diminution and who resigned from the tribe after the loss on the express condition, contained in a treaty with the United States, that they would receive their pro-rata share of the tribal assets, including the tribal fund, and (b) who are also descendants of members of the tribe who did not resign from the tribe and who received their pro-rata share of the tribal fund, as diminished, upon the dissolution

of the tribe; by providing for the inclusion in the distribution act of present descendants of persons who were (a) not resident with the tribe at the time of the wrong, or the time of the dissolution of the tribe; (b) were not beneficiaries of and did not receive any annuity payments from or any portion of the diminished tribal fund upon its distribution, and (c) were invited to, but declined to, join the tribe in residence after the wrong, but, instead, affiliated with other tribes, received annuities and allotments, organized under their own Constitution and as so organized, were recognized as an existing tribal entity after the Indian Claims Commission action was filed?

QUESTION NO. 2

Whether statements made by the Court of Claims in its opinion in another, but related, case, to the effect that the rule and policy of the Delaware Tribe in 1854 "was and had been to recognize all Delawares everywhere, who had maintained their identity as Delawares, as members of the tribe," can be considered by the Court in determining the constitutionality of a distribution statute where rights to share in damages for a breach of a treaty did not depend on "membership" in the tribe, but upon who was injured by the breach, where the evidence supporting the Court of Claims statement was not introduced in the trial on the question of rationality and such statement is contrary to the evidence which was introduced by the parties?

QUESTION NO. 3

Whether an Act of Congress providing for the distribution of funds appropriated to pay a judgment entered by the Indian Claims Commission for the breach of a treaty violates the Fifth Amendment Due Process rights or Fifth Amendment Just Compensation rights of present descendants of members of the Delaware Nation at the time it was wronged, where such distribution act provides for a payment of a part of such funds on a descendancy basis to present descendants of native-born members of the Cherokee Nation who have shared in all the assets of the Cherokee Nation, including funds from Indian Claims Commission judgments for wrongs to the Cherokee Nation?

QUESTION NO. 4

Whether Congress, in the enactment of distribution statutes to distribute funds appropriated to pay judgments entered for wrongs committed against an Indian tribe may, without violating Fifth Amendment Due Process rights and Fifth Amendment Just Compensation rights, ignore Indian law as it affects rights to share in tribal trust funds, ignore an agreement made and acted upon by ancestors of some present claimants under which it was agreed that children of such ancestors thereafter born would be native-born citizens of a tribe which suffered no part of the wrong for which the Indian Claims Commission judgment was entered, and ignore property concepts, including the fact that rights vested in the tribal assets in members of the tribe as a condition of their resignation from the tribe and undertaking the obligations of United States citizenship?

STATEMENT OF THE CASE

1. *Parties*

These consolidated actions are class actions brought pursuant to Rule 23 of the Federal Rules of Civil Procedure. The Plaintiffs represent the class denominated by the trial court as the Kansas Delaware class. The Weeks case was filed in the United States District Court for the Western District of Oklahoma against the United States, the Secretary of the Interior, two tribal business committees, and the individuals whose names appear in the caption hereof. Some of such individuals were representatives of a class denominated by the trial court as the Cherokee Delaware class and others were representatives of a class denominated as the Absentee Delaware class. The United States was dismissed from the suit on the ground that it had not consented to the action. Other parties named in the caption in the trial court were representatives of Munsee Indians, but valid service of process was not obtained on them and they did not participate in the suit. The Honorable Rogers C. B. Morton was named in the Complaint as Secretary of the Interior, judgment was entered against his successor, the Honorable Stanley K. Hathaway, and a modification of the judgment named the present Secretary, the Honorable Thomas J. Kleppe. The substitutions of successors to Secretary Morton were made as provided by Rule 25(d) of the Federal Rules of Civil Procedure.

No tribal entities were made parties to the Weeks suit and no relief was granted against tribes or their tribal authorities as such (App. B, p. 27).

The suits brought by Appellants Frazier and Rattler were filed in the United States District Court for the North-

ern District of Oklahoma against the Secretary of the Interior. The relief sought was similar to the relief sought by the Plaintiff, Wanda June Weeks. Frazier and Rattler are lineal descendants of Lewis Ketchum, a deceased Delaware Indian, whose descendants are a part of the Kansas Delaware class. Prior to trial, the court permitted an intervention in such case by "The Delaware Tribe of Indians" and the Absentee Delaware Tribe of Indians of Western Oklahoma Business Committee, and the named members of said tribe, on behalf of the Absentee Delaware Tribe of Indians of Western Oklahoma.

A three-judge court was convened under 28 U.S.C. §2284 in each case, the constituent members of the panel being the same in each case.

The Frazier-Rattler case was thereafter transferred to the Western District of Oklahoma and consolidated for trial with the Weeks case. One judgment was rendered in the cases as consolidated.

The trial court ordered that the actions proceed as class actions, defined the classes and provided for notice to members of the classes.

This appeal is by the named representatives of the Kansas Delaware class, on behalf of that class.

2. *Nature of the Case*

This action challenged the constitutionality of two federal statutes enacted for the distribution of funds appropriated to satisfy judgments entered by the Indian Claims Commission in favor of the historical Delaware Indian Tribe. The Plaintiffs asserted that the statutes violated the

Fifth Amendment Due Process rights and the Fifth Amendment Just Compensation rights of the members of the Kansas Delaware class for the reason that, as to 25 U.S.C. §§ 1181-1186, the Cherokee Delaware class was wrongfully included in the proposed distribution, and as to 25 U.S.C. §§1291-1297, the Kansas Delaware class was wrongfully excluded and each of the other classes were wrongfully included in the proposed distribution.

The trial court held that 25 U.S.C. §§1291-1297 was unconstitutional for the reason that the Kansas Delaware class was invidiously discriminated against by its exclusion. The trial court held that neither statute was unconstitutional by reason of the inclusion of the Cherokee Delaware class and the Absentee Delaware class. It is from this latter decision that this appeal is brought.

3. *Statement of the Facts*

The historical background of this action is set out at length in the opinion of the trial court, Appendix B, pages 12 through 17. Such background as is pertinent to the issues involved in this appeal will be summarized.

The Delaware Tribe of Indians was resident in Indiana and Ohio in 1818 when it ceded its land in those states and moved into Missouri. Many of its members had left the tribe before 1818. After being joined later by others, they lived at various times in Oklahoma, Arkansas and Texas. The main body of the tribe moved to Kansas onto a reservation ceded to them by treaty in 1829. The absent members, in 1853, on their way from Texas to Kansas, stopped in Oklahoma where they lived as tenants at will on the

Choctaw reservation and thereafter affiliated with the Wichita and Caddo Indians and maintained a tribal identity as the Absentee Delaware Tribe of Western Oklahoma.

The value of the Kansas lands ceded to the Delaware Nation in exchange for their Indiana and Ohio lands was less than that of the Indiana and Ohio lands, which fact was the basis for a judgment entered by the Indian Claims Commission in Docket 337.

In 1854, the main body of the tribe in Kansas entered into a treaty with the United States, which was not signed by the Absentee Tribe, ceding land to the United States under the terms of which the ceded land was to be sold at public auction, with the proceeds being used to create a Delaware general tribal fund. This fund was to be invested by the President for the benefit of the Delaware people in stocks and bonds, the principal to remain unimpaired and the interest to be used annually for the benefit of the Delaware people.

The United States, in breach of such treaty, sold the land in 1856 and 1857, but did not sell it at public auction, as required by the 1854 Treaty. As a result of this breach, the trust fund was diminished by the failure to obtain the higher price the Indian Claims Commission found would have been received had the sales been by public auction. This loss by the Delaware Indians was the basis for the judgment entered by the Indian Claims Commission in Dockets 72 and 298. The judgment included interest from 1857 at five per cent per annum based upon the treaty obligation to invest the proceeds.

In 1860, the Delaware Tribe in Kansas, by treaty, agreed to an allotment among its resident members of

its residence lands, each member being entitled to an eighty-acre allotment. They also agreed to sell the remainder of their reservation to a railroad, the proceeds to be placed in the trust fund created pursuant to the 1854 Treaty. In such treaty, the Delaware Tribe acknowledged that about two hundred of its members were "down among the Southern Indians" and, believing that they would return soon, it was agreed that eighty acres each be set apart for them, to be allotted to them as they returned. This treaty provided that until the Absentees returned, the allotment set apart for them would belong to the nation in common.

The absentees were notified of their right to join and were invited to join the main body of the tribe, but most of them chose to remain in Oklahoma and refused to move to Kansas. The few individuals who did move to Kansas became a part of the main body of the tribe and their descendants are not in the Absentee class in this action.

In 1866, as a part of the general policy of removing all Indians from Kansas to Indian Territory, the Delaware Tribe, not including the Absentees, entered into a treaty with the United States under the terms of which the tribe agreed to move to land in "Indian country" to be acquired by the United States by purchase. The United States was to be reimbursed from the Delaware general trust fund for its actual costs in acquiring the land.

The 1866 Treaty provided that adult Delaware Indians who desired to remain in Kansas could do so. Upon such election, they were to resign from the tribe and to be sworn in as United States citizens by the judge of the District Court of the United States for the District of Kan-

sas. Each would thereupon be entitled to receive a patent to his allotted land "and his just proportion, in cash or in bonds, of the cash value of the credits of said tribe, principal and interest, then held in trust by the United States; and also, as the same may be received, his proportion of the proceeds of the sale of lands under the provisions of this treaty, when he shall cease to be a member of said tribe."

Such treaty further provided that the minor children of the adults who elected to remain in Kansas should be construed to have also elected to sever their connection with the tribe "for the time being" and be entitled to their just proportion of the annuities of the tribe. At age twenty-one, these minors were to have had an option to elect whether to move to the tribe or to become United States citizens. In the event they elected to become United States citizens, they were to receive patents to their allotted lands and their pro-rata share of all annuities and trust property held by the United States for them. No provision was made in the Treaty of 1866 reserving any rights to the Absentees in Oklahoma.

In 1866, the United States, by treaty with the Cherokee Nation, purchased for the Delawares one hundred and sixty acres for each Delaware Indian who would elect to move from Kansas. If the Delawares selected their land east of 96° longitude, they would be required to dissolve their tribal government and each Delaware was to become a citizen of the Cherokee Nation.

In 1867, the individual Delawares made their election and 21 adults, having 48 minor children, elected to remain in Kansas. The remainder (985 persons) elected to move

to the Cherokee Nation and become known as the Registered Delawares. The Delaware Tribe entered into an agreement with the Cherokee Nation in which the Delawares elected to receive separate allotments of one hundred and sixty acres each east of the 96° longitude. Each Delaware Indian, upon removing, was to become a member of the Cherokee Nation "with the same rights and immunities, and the same participation (and no other) in the national funds, as native Cherokees, save as provided in this agreement. And the children hereafter born of such Delawares so incorporated into the Cherokee Nation shall in all respects be regarded as native Cherokees."

The present Kansas Delaware class is composed of descendants of both the 21 adults and the 48 minors who remained in Kansas. The present Cherokee Delaware class is composed of the descendants of the 985 Registered Delawares.

The tribal government of the Delaware Nation was dissolved pursuant to the agreement with the Cherokee Nation. The Delawares residing in the Cherokee Nation were thereafter a band of the Cherokee Nation and preserved a group identity. Their chief had no official position and after the last chief died in 1896, no chief was thereafter elected. A business committee was formed and has existed to the present for the purpose of pursuing rights against the United States. Such business committee did not function from about 1906 to about 1924. This band has called itself the Delaware Tribe of Indians but was not recognized by the United States as a tribal unit until after this suit was filed. It had no roll of members.

Since the Delaware tribe was abolished pursuant to the 1867 agreement with the Cherokee Nation, there was no longer a tribe to which the minor children of the adults who elected to remain in Kansas could elect, upon their reaching majority, to remove. Therefore, in 1874, the Congress appropriated from the Delaware Trust Fund the proportionate part thereof for each minor, which Act provided that such minors would be entitled to receive a patent to their allotments and they were each declared to be United States citizens. Only one of such minors ever resigned from the tribe. No provision for any payments to Absentees was made in this Act.

The remainder of the Delaware Trust Fund was distributed to the Registered Delawares, the last distribution being made in 1893. No annuity payments were made to Absentees and no part of the general fund was distributed to Absentees. Had the funds now appropriated to compensate for the breach of the treaty obligations to sell the lands under the 1854 Treaty at public auction been in the trust fund, no part of such fund would have been paid to Absentees.

Subsequent to 1867, and before 1904, some of the Kansas Delawares moved to the Cherokee Nation and obtained citizenship by private arrangement with the Cherokee Nation. Being Delaware Indians, they were accepted as a part of the Delaware band and one of the Kansas Delawares served as chairman of the business committee for 29 years. They attended meetings and a special resolution was adopted by the General Council of the Delaware Tribe of Indians acknowledging that some of the Kansas Delawares were accepted as members of such band and were entitled to share in the assets of the "tribe."

Disputes arose between the Delaware members of the Cherokee Nation and the non-Delaware members as to the status of the Delawares as citizens of the Nation, as to the extent of their rights to share in the sale by the Cherokee Nation of its lands and also as to the nature of the estate each Delaware received in the one hundred and sixty-acre tract allotted to him. Pursuant to Congressional Acts granting them permission to sue, the Delawares brought actions in the Court of Claims for the resolution of these disputes. This Court in *Cherokee Nation* v. *Journeycake*, 155 U.S. 196, 15 S.Ct. 55, 39 L.Ed. 120 (1894) and *Delaware Indians* v. *Cherokee Nation*, 193 U.S. 127, 24 S.Ct. 342, 48 L.Ed. 646 (1904), affirmed the Court of Claims in holding that the Delawares who joined the Cherokee Nation under the provisions of the agreement of 1867 were entitled to share in all Cherokee assets and income. The status of the children of such Delawares born after 1867 was determined by the Court of Claims in the *Journeycake* case, *supra*, as being "children of Cherokee blood." This Court, referring to the status of such children, said that they "should in all respects be regarded as native-born Cherokees." The Court went on to state that: "This last clause was not inserted with the view of giving additional rights to such children, but to prevent any question as to their inheritance of all rights which their fathers received under the agreement."

In the *Delaware Indian* case, *supra*, this Court, referring to the children of the 985 Delawares who moved to the Cherokee Nation, said:

> "Such children are to have the rights of native Cherokees and no more. Their parents were incorporated into the Cherokee Nation with certain specific rights; the children were to stand upon an equality with their

adopted brethren of the Cherokee blood." 193 U.S. at 138, 24 S.Ct. at 346, 48 L.Ed. at 652.

The band of Delaware Indians residing in the Cherokee Nation filed twelve suits against the United States for wrongs committed against the Delaware Nation, some of such alleged wrongs occurring prior to their removal to the Cherokee Nation and some in connection with such move. A compromise and settlement of these suits was made and in 1904 Congress appropriated $150,000 in payment of such compromise. The appropriation act for this sum provided that the money was to be paid to the "Delaware tribe of Indians residing in the Cherokee Nation as said tribe shall in counsel direct." No Kansas Delawares still residing in Kansas made claim to nor shared in the distribution of such money. The right of some of the Kansas Delawares, who had moved to the Cherokee Nation after the agreement of 1867 but not under its terms, to claim shares of such funds was the subject of a Comptroller's opinion. The Comptroller held that it was the intent of Congress to pay such money only to the Registered Delawares and their descendants residing in the Cherokee Nation and that Kansas Delawares, though resident in such Nation, were not there by virtue of the 1867 agreement and they could not share. A payroll for the payment of this $150,000 was prepared and approved by the Secretary of the Interior on April 20, 1906. Such payroll did not include any members of the Absentee Tribe and the record is silent as to whether any Absentees made a claim to be entitled to share in such fund.

When the Cherokee Nation was dissolved and the Dawes Commission Roll was prepared, the Registered Dela-

wares then alive were shown on such roll as "Delaware Cherokees." The children of the Registered Delawares born after 1867 and their children then alive were not included on the Delaware Cherokee roll, but were listed as "Cherokees by Blood." All Delawares on the Dawes Commission Roll received Cherokee Nation allotments and all other benefits as citizens of the Cherokee Nation.

The Absentee Delaware Tribe of Indians of Western Oklahoma was not, in 1940, a recognized tribe. These Indians of Delaware descent were included in a census taken in 1940 of the Anadarko Agency area in Western Oklahoma and the various Indians on such roll were identified by their ancestry as either Wichita, Caddo or Delaware. There was no tribal roll of the Absentee Delawares and the census roll of 1940 included only Indians of Delaware ancestry who were resident in 1940 in the area for which the census was taken.

In 1948, the Delaware Tribe of Indians filed an action in the Indian Claims Commission which was refiled by an Amended Petition in 1951 and was tried under Docket No. 27A. That action was brought to recover additional money for the cession of the "outlet" land under the treaty of 1854 and is a different cause of action than the one involved in this suit.

In 1952, an action was filed by the Absentee Delaware Tribe of Oklahoma *ex rel.* W. E. Exendine and Myrtle Holder and was tried under Docket No. 241. This action was brought as a representative suit on behalf of the Delaware Nation and was also, like the case in Docket 27A, brought to recover additional money for the cession of the "outlet" land under the treaty of 1854.

The Government contested the standing of each group to pursue the suits, contending that neither group was a tribe, band or other identifiable group within the meaning of the Indian Claims Commission Act. Each group contended that it was the sole surviving entity of the Delaware Nation. The Indian Claims Commission consolidated the two actions and found that the Plaintiffs were identifiable groups with joint standing to pursue the actions and "any recovery for such injury must be for the benefit of all descendants of the Delaware Nation as constituted in 1829 and 1854."

In an appeal to the Court of Claims in Dockets 27A and 241, the Court of Claims affirmed the findings by the Indian Claims Commission that the two groups had group identity and had sufficient interest in the claim to entitle them to jointly pursue the action relating to the cession of the "outlet" lands. In discussing this point, the Court of Claims said:

> "We think that the rule and policy of the Delawares at that time (1854) was and had been to recognize all Delawares everywhere, who had maintained their identity as Delawares, as members of the tribe. If, therefore, the alleged wrong had been actionable at the time it occurred, the absent members of the tribe would have been entitled to share in the recovery. We are cited to no rule adopted by the tribe after that time, to the effect that a Delaware who did not join the main body of the tribe and incorporate himself into the Cherokee Nation thereby forfeited or abandoned his membership in the Delawares and his rights in the tribe's property or claims."

The Docket 27A and 241 case involved a claim for damages for the purchasing of land by the United States for

$10,000, or one cent per acre. Such action did not involve the Delaware Trust Fund which was not shared with the Absentees. There is no language comparable to the above in the Docket 72 and 298 case which did involve the trust fund. Further, the statement by the Court of Claims regarding the right of absent members of a tribe to share in the proceeds of a judgment for a wrong committed when they were not resident with the tribe was contrary to the express holding of this Court in the case of *Eastern Band of Cherokee Indians* v. *United States*, 117 U.S. 288, 6 S.Ct. 718, 78 L.Ed. 880 (1886).

The Court of Claims, in other cases appealed to it from the Indian Claims Commission, after the decision in Docket 27A and 241, expressly denied the right of absent tribal members to share in recoveries for wrongs committed while they were absent. See *Prairie Band of Potawatomi Indians* v. *United States*, 165 F.Supp. 139 (Ct. Cl. 1958) *cert. den.* 359 U.S. 908, 79 S.Ct. 587, 3 L.Ed.2d 574 (1959); and *Miami Tribe of Oklahoma* v. *United States*, 281 F.2d 202 (Ct. Cl. 1960). These cases each cited and followed the holding of this Court in the *Eastern Band of Cherokee Indians* case, *supra*.

The significance of these legal matters in the statement of facts will be demonstrated, *infra*, in the discussion of the holdings of the trial court as they relate to Question No. 4, *supra*.

The Absentee Delaware Tribe of Oklahoma *ex rel.* W. E. Exendine and Myrtle Holder filed an action in the Indian Claims Commission which was tried under Docket No. 337. This action was to recover for the gross disparity between

the value of the lands ceded by the Delaware Nation in 1818 and the value of the lands ceded in Kansas to the tribe by the supplemental treaty in 1828. The Delaware Tribe of Indians was not a party to the Docket 337 suit.

In 1951, the Delaware Tribe of Indians filed an action in the Indian Claims Commission which was tried under Docket No. 72. The Chairman of the Business Committee who signed the agreement employing counsel to file this suit was Joseph A. Bartles, a Kansas Delaware. This suit was brought to recover for the loss to the tribal fund due to the failure of the United States to sell land at public auction as provided in the Treaty of 1854. The Absentee Delaware Tribe of Oklahoma *ex rel.* W. E. Exendine and Myrtle Holder also filed an action to recover for the same loss, its action being tried under Docket No. 298. These actions were consolidated and the ruling of the Commission on the question of standing in Dockets 27A and 241 was adopted by the Commission as likewise applying to these Dockets.

The Absentee Delaware Tribe of Oklahoma adopted a constitution and was recognized as a tribe by the Secretary of the Interior in 195 . The tribal membership was limited to Absentee Delaware Indians of one-eighth blood or more.

In 1963, a judgment was entered in Indian Claims Commission Docket 337 in favor of the Plaintiff on behalf of the descendants of the Delaware Nation as constituted in 1818, for $1,627,244.64.

On September 21, 1968, Public Law 90-508 (25 U.S.C. §§1181, *et seq.*) was enacted in which Congress provided that the funds appropriated to pay the judgment in Indian

Claims Commission Docket 337 be paid per capita to each person whose name or the name of a lineal ancestor appears on the Delaware Indian per capita payroll approved by the Secretary on April 20, 1906 (Cherokee Delawares), or whose name or the name of a lineal ancestor is on or is eligible to be on the constructed base census roll as of 1940 of the Absentee Delaware Tribe of Indians of Western Oklahoma, approved by the Secretary (Absentee Delawares); or who was a lineal descendant of Delaware Indians who were members of the Delaware Nation of Indians as constituted at the time of the Treaty of October 3, 1818 ("catch-all" inclusive of the Kansas Delawares).

Pursuant to regulations adopted by the Secretary providing the procedures for filing claims to share in the Docket 337 funds, about 1500 Munsee Indians whose ancestors were of Delaware blood, but who absented themselves from the tribe before 1818, filed claims. These claims were disallowed at the Bureau of Indian Affairs level. The filing of these Munsee claims and the processing of them caused great delays in preparing a final roll for payment.

On September 10, 1969, a judgment was entered in Indian Claims Commission Dockets 72 and 298 for $9,168,-171.13. Bills were introduced in Congress for a distribution act for funds appropriated to pay this judgment and such bills provided for criteria identical to those previously used to determine eligibility to share in the Docket 337 funds except that the date under the "catch-all" provision was changed to 1854.

Legislative hearings were held on the proposed act for the distribution of the Docket 72 and 298 funds and the

difficulties and delays which had resulted from the Munsee claims in regard to Docket 337 was made known to the Sub-Committees. It was determined that the Munsee Indians should not share in the Docket 72 and 298 funds and amended bills were introduced which had for their purpose excluding any claim by Munsee Indians. The question of whether the Kansas Delawares should be entitled to share was never raised nor in any way discussed in the legislative hearings. The amended bills, in order to eliminate the Munsee problem, dropped the "catch-all" provision entirely and limited eligibility to the two above mentioned rolls. No one noticed that by this action, the Kansas Delawares were inadvertently omitted from participation in the judgment funds. Upon learning of this acknowledged error and omission, the Chairman of the Delaware Tribe of Indians who had been the spokesman for the Indians at the legislative hearings, attempted to find a solution to the problem. A meeting was held between representatives of the Indian groups and government representatives at which it was decided that the 1906 per capita payroll could be administratively construed to be an "open roll" as was the Absentee Roll, and the House Sub-Committee on Indian Affairs was advised that this would be done. No amending legislation was therefore introduced.

The Kansas Delawares filed their claims which were then disallowed because their name or the name of a lineal ancestor did not appear on the 1906 per capita payroll. After administrative appeals were exhausted, this suit was filed as a class action on behalf of the Kansas Delaware class. A preliminary injunction against the payment of the money was entered after a hearing. Prior to the filing of

this action, a partial payment of approximately $1,000,000 of the Docket 337 funds had been made. The balance of such funds were being withheld pending the completion of the final roll. The temporary injunction reached the remainder of the Docket 337 funds and all of the Docket 72 and 298 funds except a minor amount allowed to be spent for expenses and attorney's fees.

After jurisdiction was noted following extensive briefs, the case was tried on the merits in May, 1975. The evidence adduced at the trial was all documentary except the testimony which had been received at the hearing on the application for the preliminary injunction. The files from the Indian Claims Commission in Dockets 337, 72 and 298, 27A and 241 were furnished by the Clerk of the Indians Claims Commission to the trial court in order that it could judicially note the materials in such file. The files of the Clerk of the Court of Claims in *Journeycake* v. *The Cherokee Nation, supra,* and *Delaware Indians* v. *Cherokee Nation, supra,* were furnished to the trial court for judicial notice purposes. The trial court obtained through the Administrative Office of the United States Courts the legislative history files on the two congressional acts in issue.

There are no material facts in issue on the questions presented in this appeal.

The trial court, though holding that the distribution act for the Docket 72 and 298 funds was unconstitutional because it invidiously discriminated against the members of the Kansas Delaware class by their exclusion, determined the issue of whether such act was also unconstitutional because the members of the defendant classes were

permitted to share in the funds and held that there was a permissible rationale supporting the decision of Congress to include them. The Appellants assert that the trial court erred in finding that there was a constitutionally permissible rationale to support the inclusion of the Absentee Delawares in the Docket 72 and 298 funds; that the established law and the historical facts were contrary to such finding; and that the fact that the Court of Claims had stated that the Absentees could share in Docket 27A and 241 funds did not furnish a constitutionally permissible rationale to support the Act including the Absentees in Docket 72 and 298 funds.

SUMMARY OF THE STATEMENT OF THE CASE

In summary, the salient facts of this case are that the Congress enacted distribution statutes to provide criteria for the sharing of appropriated funds to pay two Indian Claims Commission judgments; in the case of Indian Claims Commission Docket 72 and 298, the statute provides for sharing in such funds by present representatives of ancestors who suffered no part of the wrong and, if so distributed, the shares of the rightful claimants would be diminished while the payments to the present representatives of Absentees would amount to a gratuity. The only rationale offered to support this diversion of appropriated funds from rightful claimants is that the Absentee ancestors were "members" of the tribe at the time of the wrong. The evidence, however, shows conclusively that membership, if it existed at the time, did not entitle such absent members to share in the funds which were diminished by the wrong and, in

fact, they did not share in the distribution of the fund. The proffered rationale of "membership" is, therefore, unrelated to the purpose of the Indians Claims Commission Act, *viz.*, to compensate Indians for wrongs done to their ancestral tribe.

In the case of the Cherokee Delaware class, the present claimants are *not* lineal descendants of members of the historical Delaware tribe. Intermediate ancestry, through native-born Cherokee national citizens, precludes any claim of Delaware Indian ancestry to support a claim to share in either of the two Indian Claims Commission judgment funds involved. Such Cherokee Delawares have at all times been entitled to and have received benefits as Cherokee National citizens, including allotments of land ceded to the Cherokee Nation before the wrong to the Delawares in 1854.

Dual citizenship in two Indian tribes normally results from ancestral ties to two tribes through different ancestors. In this instance, the Cherokee Delawares claim to be members of two tribes through a single ancestor. If dual membership cannot be so claimed, then such class would not be entitled to share in the judgment funds and the shares of the rightful claimants would be diminished.

This case does not present for determintaion political questions of current membership in tribes or matters relating to funds administered by the government in its guardianship relationship with Indian tribes. The Delaware Tribe which was harmed by the wrong was abolished in 1867 and through the judicial processes, the determination has been made that the historical tribe was entitled to the damages

assessed. The determination of the fundamental underlying facts which form the parameters for the later choices made by Congress is a judicial matter, not a political matter, and has been committed by Congress to a judicial forum. The Congress, in providing for distribution of such funds contrary to established law, did so in an arbitrary manner and without a supporting rationale which meets the standards of the Fifth Amendment.

THE QUESTIONS ARE SUBSTANTIAL

SUBSTANTIALITY OF QUESTIONS NO. 1 AND 2

The legislative purpose of the Indian Claims Commission Act is to compensate present representatives of historical Indian tribes which were wronged by breaches of treaties or by less than fair and honorable dealings. These procedures having resulted in a judgment entered on behalf of the Delaware Nation for breach of the treaty of 1854, and the appropriation having been made to satisfy such judgment, the Congress then enacted a distribution statute which provided that the funds so appropriated be paid to a class of persons (Absentee Delaware class) whose ancestors suffered no part of the wrong. By so doing, the statute diminished the shares of the rightful beneficiaries to the extent that the statute provided for payment of a portion of such funds to the present representatives of non-injured parties.

This appeal presents for consideration the question of whether this Act can be said to bear a fair and reasonable relationship to the purpose of the Indian Claims Commission Act and to the constitutionally permissible purposes of Indian Claims Commission judgment legislation. If not, the

Plaintiffs contend that the Act invidiously discriminates against the rightful beneficiaries in violation of the Due Process Clause of the Fifth Amendment. The proffered rationale in support of such departure from a distribution plan limited to the personal representatives of the parties who suffered the wrong is that such non-injured parties may have been considered by the tribe at the time of the wrong as "members" of the tribe. The Absentee class represents persons with an ethnological background identical to the participating Delaware tribal members. But they absented themselves from the tribe before the wrong, became a separate political body with separate economic interests, were not parties to the treaty which was breached and did not receive any of the benefits which did flow to the tribe from the treaty. The trial court did not distinguish the status and rights of such persons from those persons who were resident on the lands sold under the provisions of the treaty, were participating members of the tribe which signed the treaty, received their pro-rata shares of the benefits of the treaty, and were the only persons whose economic interests were affected by the breach of the treaty for recompense of which the judgment was entered.

The trial court found that there was no conclusive showing as to whether the Absentee Delawares "were considered by the tribe to have retained their membership at the time of the breach of the 1854 treaty." Noting that the Court of Claims had found from its examination of the tribal history that "the rule and policy of the Delawares (in 1854) was and had been to recognize all Delawares everywhere, who maintained their identity as Delawares, as members of the tribe," the trial court stated that it could not say that the Congress had no rational basis for the

inclusion of the Absentees in the provisions for distribution for the award to redress the 1854 wrong.

The right to share in the proceeds of a judgment to compensate for a historical wrong to an Indian tribe does not depend on "membership" at the time of the wrong but rather whether the group claiming a right to share was wronged by the breach of the treaty. The trial court found, as to the Absentees, that they (a) were not resident with the tribe in Kansas in 1854, (b) did not sign the Treaty of 1854, (c) did not receive any portion of the trust fund which was diminished by the treaty breach (d) did not receive any annuities from the tribal fund income, (e) were invited to rejoin the tribe after the wrong but they refused to do so, and (f) maintained group identity in Oklahoma, and had chiefs and a tribal council up to the present time. The evidence and historical data show further that the Absentees affiliated with the Wichita Indians in Oklahoma about 1859 and received allotments as members of the tribal group called the Wichitas and affiliated bands of Indians (Jerome Agreement, 28 Stat. 895, June 4, 1891, ratified March 2, 1895, 28 Stat. 876). See also, *Wichita and Affiliated Bands of Indians in Oklahoma, et al.* v. *United States*, 89 Ct. Cl. 378.

The Absentee Delaware Indians admittedly had the same ethnological background as the Delaware Indians who made up the membership of the main body in Kansas. While each group could be called "members" of the Delaware Nation, their circumstances were far different, and that difference lay in the very area that is pertinent to a consideration of whether their economic interests were identical. The trial court erred in treating all "members"

alike. As this Court said in *Jenness* v. *Fortson* (1971), 403 U.S. 431, 91 S.Ct. 1970, 29 L.Ed.2d 554:

> "Sometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike, a truism well illustrated in Williams v. Rhodes, *supra*" [393 U.S. 23, 89 S.Ct. 5, 21 L.Ed.2d 23]. 403 U.S. at 442, 91 S.Ct. at 1976, 29 L.Ed.2d at 554 (1971).

In determining whether a statute accords equal protection of the laws, it is necessary to consider the facts and circumstances behind the law, the interests which it is claimed are protected and the interests of those who are disadvantaged. *Williams* v. *Rhodes*, 393 U.S. at 30, 89 S.Ct. at 10, 21 L.Ed.2d at 31 (1968).

This Court in *Eastern Band of the Cherokee Indians* v. *United States, supra*, said:

> "If Indians . . . wish to enjoy the benefits of the common property of the Cherokee nation, in whatever form it may exist, they must, as held by the court of claims, comply with the constitution and laws of the Cherokee nation, and be readmitted to citizenship as there provided. They cannot live out of its territory, evade the obligations and burdens of citizenship, and at the same time enjoy the benefits of the funds and common property of the nation. Those funds and that property were dedicated by the constitution of the Cherokees, and were intended by the treaties with the United States, for the benefit of the united nation, and not in any respect for those who had separated from it, and become aliens to their nation. We see no just ground on which the claim of the petitioners can rest to share in either the funds held by the United States in trust for the Cherokee Nation. . . ." 117 U.S. at 310, 6 S.Ct. at 728, 729, 29 L.Ed. at 887.

The above reference to "petitioners" was to the North Carolina Cherokees who had refused to accompany the body of the nation on its removal west of the Mississippi. Such North Carolina Cherokees at the time of the wrong had a common ethnological background with the Eastern Cherokees and had not only been invited to join the main body of the tribe, but there had been an attempt to use force to require them to do so. They, like the Absentee Delawares, elected not to rejoin the main body of their tribe. They were "members" of the Cherokee Nation in the sense used by the trial court in this action.

The reasoning of this Court as stated in the *Eastern Band of the Cherokee Indians* case, *supra*, was followed by the Court of Claims to exclude two Absentee Indian groups who were not resident with the tribes at the time of the wrongs. *Miami Tribe of Oklahoma* v. *United States, supra,* and *Prairie Band of Potawatomi Indians* v. *United States, supra.*

The differences between the economic interests of resident members *vis-a-vis* absent members of the Delaware Nation is even more relevant to the rationale question in the case at bar than in the above three cited cases. In the case at bar, the wrong for which the Indian Claims Commission judgment was entered was the diminution of a specific trust fund in which the Absentees had no interest and in which, when it was distributed, they did not share.

The legislative history of the Act for the distribution of the Docket 72 and 298 funds shows that the Congress deliberately determined that Munsee Indians, a group which had a common ethnological background with the present Delaware Indians and whose ancestors left the tribe prior

to the wrong, were not to be included. There was no relevant distinction between the status of the Absentee Delawares and the Munsee Delawares in 1854. In 1860, the tribe did invite the Absentees to rejoin the tribe and there is no indication that such an offer was extended to the Munsees. But, such offer was made after the wrong and was not accepted. It was, the Appellants assert, wholly inconsistent to include the Absentees but to exclude the Munsees. The exclusion of the Munsees was consistent with the holding of this Court that non-residents are not entitled to share in recoveries for breaches of treaties. The inclusion of the Absentees is inconsistent with such holding without there being any relevant reason for such distinction.

The Act of Congress which treated the present Absentees and the residents alike as to the distribution of the judgment funds was invidiously discriminatory against the present representatives of the resident Delawares, but not because there was an appropriation and distribution to the Absentee class of public funds *per se*. The power of Congress to so provide is not asserted to be lacking. It is the deprivation to the present representatives of the resident Delaware Indians of the full amount of the judgment funds which disadvantaged them.

The consideration of whether Congress has the constitutional power to treat the two classes of present representatives alike and to distribute such fund to each of them on a per capita basis in disregard of the nature of the wrong, the identity of the parties wronged, and the fact that the Absentees did not share in the wrong, entails a consideration of whether the power of Congress is limited by the force of the Fifth Amendment to devising a plan of distri-

bution which is reasonably calculated to accomplish the purposes of the Indian Claims Commission Act, *viz.*, to compensate Indians for the wrongs done to their ancestors through breaches of treaties and less than fair and honorable dealings. The Appellants assert that such is the purpose of such Act and that the distribution of judgment funds must be reasonably calculated to obtain that objective and that to distribute such funds to non-injured parties is contrary to such objective.

SUBSTANTIALITY OF QUESTIONS NO. 3 AND 4

Questions No. 3 and 4 involve a unique legal question for which there does not appear to be any legal precedent.

The Registered Delawares, in contracting to join the Cherokee Nation in 1867, agreed that their children thereafter born would be native-born citizens of the Cherokee Nation. In a suit to enforce their rights as citizens of such Nation, this Court held that such children had all of the rights of Cherokee citizens "and no more," and affirmed the holding by the Court of Claims that such children were "native blood Cherokee Indians." *Delaware Indians* v. *Cherokee Nation, supra.*

The present Cherokee Delaware class members are all descendants of children of Registered Delawares born after 1867 and as descendants of such children could have no standing to claim benefits accorded to Delaware Indian descendants. Under Indian law, rights of children were not inherited rights but were rights acquired by birth as children of tribal members. Their only claim could be based upon the fact that remote ancestors, prior to the birth of their first Cherokee national ancestor, had been Delaware

Indians who had been members of and resident with the Delaware tribe at the time of the wrongs for which judgments were entered in Indian Claims Commission Dockets 337, 72 and 298.

In *Halbert* v. *United States*, 283 U.S. 753, 51 S.Ct. 615, 75 L.Ed. 1389 (1931), this Court said that membership in an Indian tribe can be claimed only through parents, not grandparents. This requirement of a direct ancestral tribal claim does not exist in the case of the Cherokee Delaware class. Such class, in all other matters, have been considered as Cherokee Indians and as such they have received Cherokee allotments and shared in a Cherokee Nation recovery in Indian Claims Commission Docket 173A.

The Court of Claims, in its opinion in the Docket 27A and 241 case, a companion action to the Docket 72 and 298 cases involved in this action, held that the Delaware Tribe of Indians and the Absentee Delaware Tribe of Oklahoma had joint standing to pursue the action in a representative capacity on behalf of the Delaware Nation. Such holding, and the factual basis noted by the Court of Claims in support of standing, did not and was not intended to determine the issue of "lineal descendancy" from such tribe for purposes of distribution. The Court of Claims repeatedly has held that the award in the Commission is not to be construed as determining to whom the funds are to be paid; and that such determination is beyond the jurisdiction of the Commission. *Cherokee Freedmen* v. *United States*, 195 Ct.Cl. 39; *Turtle Mountain Band of Chippewa Indians* v. *United States*, 490 F.2d 935 (Ct.Cl. 1974).

In *Snoqualmie Tribe of Indians* v. *United States*, 372 F.2d 951 (Ct.Cl. 1967), the issue was whether the Sky-

komish Indians were members of the Snoqualmie tribe. The Court of Claims, after noting that there was language in the opinion of the Commission on the matter of relationship, said:

> "This is not to say, however, that any particular evidence in this case proves Skykomish descent for purposes of a judgment, however. That determination is left to the legislative and executive branches, and is not foreclosed by our inquiry which is necessarily limited to the jurisdictional question." 372 F.2d at 959.

In *Peoria Tribe of Oklahoma* v. *United States*, 169 Ct. Cl. at 1011, 1012, the Court of Claims said:

> "How the award is to be paid and precisely who can participate . . . are questions for Congressional and administrative determination."

The trial court in the case at bar held that in determining who could share in an Indian Claims Commission judgment, the function of Congress was to decide the composition of the injured tribe at the time of the wrong and that the current tribal membership should not be regarded. Further, in determining such question, the trial court said that technical property concepts are not controlling. The inclusion of the Cherokee Delaware class in the distribution acts in question was affirmed as being suported by a rationale based upon their being "lineal descendants of the injured tribe" and that Congress, therefore, had sound ground for including them.

The question is whether the members of the Cherokee Delaware class can be considered as lineal descendants of a tribe when intermediate ancestors to such tribe were

born as native-blood members of another tribe of Indians. The holding of this Court in the *Halbert* case, *supra*, is that members of such class cannot trace their *Indian* ancestral line to the Delaware tribe. If the children who were born as native-blood Cherokee citizens could not claim rights to Delaware tribal assets by virtue of their status at birth, by what logic or constitutionally permissible rationale can they claim such rights? They inherited no Delaware tribal rights. They were not entitled to any of such rights as incident to their birth.

To include the members of such class in the distribution of the funds appropriated to pay judgments entered for the benefit of the historical Delaware tribe based upon the assertion that members of such class are lineal descendants when under Indian law they were not lineal descendants in any sense that entitles them to share in Delaware tribal assets, is, we submit, an arbitrary classification of such persons, denying equal protection of the laws to those entitled to receive such assets.

Congress has recognized the members of the Cherokee Delaware class as Cherokee Indians and this Court has said that they are entitled to property interests as Cherokee national citizens and no more. The trial court erred, we submit, in finding that their inclusion in the distribution act was not arbitrary and was supported by a rationale sufficient to satisfy the requirements of the Fifth Amendment.

CONCLUSION

The issues tendered in this appeal affect many thousands of claimants to the Delaware funds and many millions of dollars are involved. The status of such parties in relation to other actions pending in the Indian Claims Commission will be affected. The Secretary of the Interior is withholding the submission of plans to Congress under Public Law 93-134, 87 Stat. 466, for distribution of over two million dollars in funds appropriated to pay judgments in Indian Claims Commission Dockets 287, 27A and 241, also involving the Delawares. There are other actions pending in the Indian Claims Commission involving the rights of Absentee Shawnees and Cherokee Shawnees in which almost identical issues will be involved when they reach the distribution stage.

The opinion of the trial court, insofar as it appears to approve plans for distribution of funds based on "membership" unrelated to who was harmed by the breaches of treaties, can lead to gross discriminations and inequities unless a rationale is required which relates to the purpose to be accomplished, *viz.*, to compensate the parties whose ancestors were wronged. Any other "rationale" will violate established Fifth Amendment requirements of Equal Protection and Just Compensation. Appellants do not challenge any legislative determination of membership, but, rather, challenge a determination that historical membership, without more, suffices as a basis for participation in Indian Claims Commission judgment funds.

Four appeals have been filed from the judgment dated December 18, 1975. If this Court notes probable jurisdiction

of any one of such appeals, it would be proper, we respectfully submit, to note probable jurisdiction in all since they are interrelated and will present related questions for the Court's determination.

The determinations by the trial court regarding the inclusion of the Absentee class and the Cherokee class in the distributions, and the effect thereof on the constitutionality of the Docket 72 and 298 distribution Acts (otherwise held to be invalid) were made in order to achieve a prompt decision of these issues and in the interest of economy of efforts (see footnote 42 to the majority opinion, page 55 of Appendix B). The only contention that the distribution Act for the Docket 337 funds is unconstitutional is that the Cherokee Delawares could not rationally be included. The basis for such contention would apply with like force to the Docket 72 and 298 funds. The determination of the question as to the Docket 337 funds will necessarily control when Congress enacts legislation to distribute the Docket 72 and 298 funds and funds from future Indian Claims Commission judgments.

We respectfully submit that this appeal involves substantial questions of which this Court should note probable jurisdiction.

Respectfully submitted,

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March, 1976

APPENDICES

APPENDIX A

FILED
DEC 18 1975
REX B. HAWKS
CLERK, U. S. DISTRICT COURT
BY (s) *Walter W. Mounts*
Deputy

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

WANDA JUNE WEEKS, Plaintiff, v. United States of America; STANLEY K. HATHAWAY, Secretary of the Interior of the United States of America and Trustee for the Delaware Indian People; The Delaware Tribal Business Committee; The Absentee Delaware Tribe of Oklahoma Business Committee; Bruce Miller Townsend; Nathan H. Young; Mary Townsend Crowe; Henry A. Secondine; Y. A. Scott; Arthur L. Thomas; Alene Martinez; Myrtle Holder; Tommy Holder; Lawrence Snake; Charles Taylor; Clio Church; Mabel Murray, and Grace Spooner, Defendants,	No. CIV-73-586-E
and	(CONSOLIDATED)
DOROTHY FRAZIER and RUTH RATTLER, on their own behalf and on behalf of all those similarly situated, Plaintiffs, v. STANLEY K. HATHAWAY, Individually and in his capacity as Secretary of	No. CIV-74-368-D

the Interior of the United States of America,
Defendant,

THE DELAWARE TRIBE OF INDIANS,
and
The Absentee Delaware Tribe of Western Oklahoma Business Committee, and the named members of said Tribe, on behalf of the Absentee Delaware Tribe of Western Oklahoma (the Absentee Delaware Class.).
Intervenors.

Delmer L. Stagner and Stephen P. Friot, Oklahoma City, Oklahoma (Halley, Spradling, Stagner & Alpern, Oklahoma City, Oklahoma, and Henry B. "Boots" Taliaferro, Jr., of Casey, Lane & Mittendorf, Washington, D. C., of counsel, on the briefs) for Plaintiff Weeks

John G. Ghostbear, Tulsa, Oklahoma, for Plaintiffs Frazier and Rattler

Duard R. Barnes, Assistant Solicitor of Indian Affairs, United States Department of Interior, Washington, D. C., and Givens L. Adams, Assistant United States Attorney, Oklahoma City, Oklahoma (William R. Burkett, United States Attorney, Oklahoma City, Oklahoma on the briefs) for Defendant Secretary of the Interior

Bruce Miller Townsend, Tulsa, Oklahoma, and Clyde J. Watts, Oklahoma City, Oklahoma (Watts, Looney, Nichols, Johnson & Hayes, Oklahoma City, Oklahoma, on the briefs) for Defendant and Intervenors, The Delaware Tribal Business Committee, et al

Granville Tomerlin and B. J. Rothbaum, Jr., Oklahoma City, Oklahoma (Tomerlin, High & Patton, Oklahoma City, Oklahoma, on the brief) for Defendant The Absentee Delaware Tribe of Oklahoma Business Committee

JUDGMENT

Pursuant to the findings of fact and conclusions of law appearing in the opinion of the court it is ordered, adjudged and decreed as follows:

1. That this judgment, together with the court's opinion expressing its findings and conclusions, shall determine the rights between the parties to these actions and between the plaintiff Kansas Delaware class, and the defendant Cherokee Delaware class and the defendant Absentee Delaware class, as defined in the court's order entered November 18, 1974, approving forms of class action notice and procedures for giving notice, and the court's orders entered November 1 and 4, 1974, pertaining to class action procedures;

2. That Pub. L. 90-508, 82 Stat. 861, 25 USCA §§ 1181-1186, is hereby declared valid and constitutional; that the preliminary injunction entered on March 21, 1974, in Civ-73-586-E, Wanda June Weeks v. United States of America, et al, is vacated as to all restraint against distribution by the defendant Secretary of the Interior, his agents and employees, of the judgment funds appropriated to satisfy the award entered in Indian Claims Commission Docket No. 337, and the increments of interest thereon; and that all relief sought by the plaintiffs and the plaintiff Kansas Delaware class in these actions pertaining to said statute, award and judgment funds is denied;

3. That it is adjudged that the provisions of Pub. L. 92-456, 86 Stat. 762, 25 USCA §§ 1291-1297, are valid insofar as they provide for the inclusion of the defendant Cherokee Delaware class and the defendant Absentee Delaware class in the distribution of the judgment funds appropriated to satisfy the award entered in Indian Claims Commission Dockets Nos. 72 and 298; that, however, said statute makes irrational, arbitrary and unconstitutional classifications for the distribution of said judgment funds in violation of the

Due Process Clause of the Fifth Amendment to the United States Constitution by invalidly excluding therefrom the plaintiff Kansas Delaware class; that the portions thereof making the unconstitutional classifications and exclusion are not severable from the remainder of said statute; that, therefore, the invalid provisions of said statute render it invalid, void, and unenforceable as a whole, as presently enacted; that the judgment funds appropriated to satisfy said award in Dockets Nos. 72 and 298 and the increments of interest thereon are under the control of the Defendant Secretary of the Interior and required to be dispersed and credited pursuant to said distribution statute, unless equitable relief is granted; and that, therefore, the defendant Secretary of the Interior, his agents and employees are enjoined and restrained from distributing and crediting any of the judgment funds appropriated to satisfy said award under the provisions of 25 USCA §§ 1291-1297, and the increments of interest thereon, it being provided that such restraint shall continue only to and until an amendment of the distribution provisions of said statute is enacted and approved, or until a further statute providing for distribution of said funds is enacted and approved.

4. That all other relief sought by the pleadings and motions of the parties, and which is not granted by this judgment, is denied.

s/ William J. Holloway, Jr.
William J. Holloway, Jr.
United States Circuit Judge

s/ Luther B. Eubanks
Luther B. Eubanks
United States District Judge

ENTERED IN JUDGMENT DOCKET ON DEC. 18, 1975

By: Adelaide Holston, Deputy

APPENDIX B

FILED
DEC 18 1975
REX B. HAWKS
CLERK U. S. DISTRICT COURT
BY (s) *Walter W. Mounts*
Deputy

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

WANDA JUNE WEEKS, Plaintiff, v. United States of America; STANLEY K. HATHAWAY, Secretary of the Interior of the United States of America and Trustee for the Delaware Indian People; The Delaware Tribal Business Committee; The Absentee Delaware Tribe of Oklahoma Business Committee; Bruce Miller Townsend; Nathan H. Young; Mary Townsend Crowe; Henry A. Secondine; Y. A. Scott; Arthur L. Thomas; Alene Martinez; Myrtle Holder; Tommy Holder; Lawrence Snake; Charles Taylor; Clio Church; Mabel Murray, and Grace Spooner, Defendants,	No. CIV-73-586-E
and	(CONSOLIDATED)
DOROTHY FRAZIER and RUTH RATTLER, on their own behalf and on behalf of all those similarly situated, Plaintiffs, v. STANLEY K. HATHAWAY, Individually and in his capacity as Secretary of	No. CIV-74-368-D

the Interior of the United States of America,
Defendant,

THE DELAWARE TRIBE OF INDIANS,
and
The Absentee Delaware Tribe of Western Oklahoma Business Committee, and the named members of said Tribe, on behalf of the Absentee Delaware Tribe of Western Oklahoma (the Absentee Delaware Class.).
Intervenors.

Delmer L. Stagner and Stephen P. Friot, Oklahoma City, Oklahoma (Halley, Spradling, Stagner & Alpern, Oklahoma City, Oklahoma, and Henry B. "Boots" Taliaferro, Jr., of Casey, Lane & Mittendorf, Washington D. C., of counsel, on the briefs) for Plaintiff Weeks

John G. Ghostbear, Tulsa, Oklahoma, for Plaintiffs Frazier and Rattler

Duard R. Barnes, Assistant Solicitor of Indian Affairs, United States Department of Interior, Washington, D. C., and Givens L. Adams, Assistant United States Attorney, Oklahoma City, Oklahoma (William R. Burkett, United States Attorney, Oklahoma City, Oklahoma on the briefs) for Defendant Secretary of the Interior

Bruce Miller Townsend, Tulsa, Oklahoma, and Clyde J. Watts, Oklahoma City, Oklahoma (Watts, Looney, Nichols, Johnson & Hayes, Oklahoma City, Oklahoma, on the briefs) for Defendant and Intervenors, The Delaware Tribal Business Committee, et al

Granville Tomerlin and B. J. Rothbaum, Jr., Oklahoma City, Oklahoma (Tomerlin, High & Patton, Oklahoma City,

Oklahoma, on the brief) for Defendant The Absentee Delaware Tribe of Oklahoma Business Committee

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Before HOLLOWAY, Circuit Judge; DAUGHERTY, Chief Judge, Western District of Oklahoma, and EUBANKS, District Judge, Western District of Oklahoma

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Memorandum Opinion by Holloway, Circuit Judge, in which Eubanks, District Judge, Western District of Oklahoma, joins; Daugherty, Chief Judge, Western District of Oklahoma, concurs in part and dissents in part

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MEMORANDUM OPINION

These suits challenge the constitutionality of two federal statutes. The first, Pub. L. 90-508, 82 Stat. 861, 25 USCA §§ 1181-1186, determines the Indian descendants who may participate in the distribution of an Indian Claims Commission award redressing a wrong by the United States under an 1818 treaty with the Delaware Tribe. 7 Stat. 188.[1] The second statute, Pub. L. 92-456, 86 Stat. 762, 25 USCA §§ 1291-1297, performs the same function for a separate Indian Claims Commission award redressing a breach by the United States of an 1854 treaty with the Delawares. 10 Stat. 1048.[2]

Three classes of Delaware Indian descendants are represented by the parties in these cases. The plaintiffs represent a group known as the Kansas Delawares. The defendants represent two groups of descendants known as the Cherokee Delawares and the Absentee Delawares.

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[1]The Indian Claims Commission findings and conclusions in Docket No. 337 concerning the wrong under this 1818 Treaty are reported at 9 Ind. Cl. Comm. 346.

[2]The Indian Claims Commission findings and conclusions in Dockets Nos. 72 and 298 concerning the wrong under this 1854 Treaty are reported at 21 Ind. Cl. Comm. 344.

[APPENDIX]

In 25 USCA §§ 1181-86, relating to the 1818 wrong, Congress devised distributive classifications that permitted descendants in all three classes to share in the award. Invoking the Fifth Amendment Due Process Clause and equal protection principles incorporated by it, and the Just Compensation Clause, the Kansas Delawares challenge the constitutionality of the statute's inclusion of the Cherokee Delawares in these distribution provisions.

In 25 USCA §§ 1291-97, relating to the 1854 wrong, Congress provided distributive classifications that permitted only the Cherokee Delawares and the Absentee Delawares to share in the award. With respect to this statute, the Kansas Delawares challenge the constitutionality of (1) their exclusion from the distributive provisions, specifically under the Due Process Clause and equal protection principles incorporated by it, and under the Just Compensation Clause, and (2) the inclusion of the Cherokee Delawares and Absentee Delawares, invoking the same Fifth Amendment principles.

Plaintiffs seek declaratory, injunctive and mandamus relief against distributions under both statutes.

We find merit in plaintiffs' challenge to 25 USCA §§ 1291-97 as an irrational classification, insofar as the statute excludes the plaintiff class of Kansas Delawares[3] from

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[3]The Kansas Delaware class is reported to be composed of over 600 members (plaintiff Weeks' report on membership filed February 4, 1975). As of February, 1975, it was reported that notification by mail of 496 Kansas Delawares had been achieved (plaintiff Weeks' affidavit of service of notice of class action filed February 26, 1975).

The report to the court on membership of the Kansas Delaware class filed February 4, 1975, states that presently ascertained members whose identities are known total 636. In addition, the February 26, 1975, affidavit of plaintiff Weeks states that, upon receiving additional information from the Secretary as to identities and addresses of additional Kansas Delawares, approximately 42 additional persons were mailed notice, making a total of 678 Kansas Delawares who have been identified.

participating in the distribution of the award in Indian Claims Commission Dockets Nos. 72 and 298, relating to the 1854 wrong, and enjoin the defendant Secretary of Interior from making distribution of funds thereunder. We reject all other contentions of the Kansas Delawares concerning the validity of that statute.

We do not sustain the plaintiff Kansas Delawares' challenge to 25 USCA §§ 1181-86 relating to the 1818 wrong, and vacate the preliminary injunction restraining distribution of the remaining funds of the award in Indian Claims Commission Docket No. 337 redressing that wrong.

The plaintiff Weeks in No. Civ. 73-586-E filed her complaint alleging that this court has jurisdiction of this action "under Article III, Section 2 of the Constitution of the United States, under 28 U.S.C. § 1331 and § 1132, and 5 U.S.C. § 701 et seq." (Complaint para. 14). This three-judge court was convened to hear the case. After an evidentiary hearing we entered a preliminary injunction enjoining the defendant Secretary from distributing any of the funds held by him that were appropriated by Congress to satisfy the judgments in Indian Claims Commission Docket No. 337, dealing with the 1818 wrong, and Dockets Nos. 72 and 298, dealing with the 1854 wrong (with specified limited exceptions agreed to by all parties), pending the final determination of this action.

Plaintiffs Frazier and Rattler in No. Civ. 74-368-D filed their complaint in the Northern District of Oklahoma. Because this case involves substantially the same parties and subject matter, it was transferred to this district and consolidated with No. Civ. 73-586-E pursuant to Rule 42(a) F.R.Civ.P. The same panel was constituted to hear it.

This court sustained a motion to dismiss of the United States on the ground that the action as against the Government was an unconsented suit. Other motions to dismiss and for summary judgment were denied and we certified the

action as against the remaining defendants to proceed as a class action by plaintiff class, the Kansas Delawares, against, *inter alia*, defendant classes, the Delaware Tribe of Indians (the Cherokee Delawares) and the Absentee Delaware Tribe of Western Oklahoma (the Absentee Delawares).[4] No question is raised as to the propriety of the class action procedure.

We will discuss the issues under the following propositions: (1) the historical background; (2) jurisdiction and justiciability; (3) validity of the statutory exclusion of the Kansas Delawares from distribution of the award redressing the 1854 wrong; (4) validity of inclusions of the Cherokee Delawares in distribution redressing both the 1818 and 1854 wrongs, and of the inclusion of the Absentee Delawares in distribution redressing the 1854 wrong;[5] and (5) equitable jurisdiction and remedies. This opinion will constitute our findings and conclusions pursuant to Rule 52, F.R. Civ.P.[6]

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[4]Class action representation in this suit is proper under Rule 23(b)(1)(B) and Rule 23(b)(2), F.R.Civ.P., since adjudication with respect to the individual members of the classes would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests, and since the defendant Secretary and the several classes have acted on grounds generally applicable to said classes, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the classes as a whole.

[5]As noted, the plaintiff Kansas Delawares do not challenge the inclusion of the Absentee Delawares in distribution of the award redressing the 1818 wrong.

[6]There were numerous objections to the many exhibits offered in evidence at trial. We are citing those exhibits relied on in reaching our findings and conclusions and deny objections to the cited proof. Otherwise it is unnecessary to express evidentiary rulings.

I

THE HISTORICAL BACKGROUND

The Delaware Indians were originally on the eastern seaboard, but by the second decade of the 19th century they were geographically scattered. One group of Indians of Delaware ancestry, the Munsee Indians, had become associated with the Moravian Indians, later known as the Christian Indians, or Christian Munsees, and had settled in Canada. Other Munsees were living with the Stockbridge in New York. This group became known as the Stockbridge Munsee. By 1818, the nucleus of the Delaware Nation was residing principally in Indiana and Ohio. See Senate report accompanying H.R. 16402, S. Rep. No. 1518, 90th Cong., 2d Sess. 8, which contains an historical outline of the Delaware Tribe and the various groups involved here (Defendants Secretary and Cherokee Delawares' Ex. 4, hereinafter cited as Senate Report).

Several years earlier, in 1793, the Spanish Government had granted a tract of land in Missouri to certain bands of the Delawares in Indiana and Ohio who wished to move beyond the Mississippi. A number of the Delawares moved to this grant, and later, on to Arkansas, Oklahoma and Texas, but the main body of the Tribe remained behind until the Treaty of St. Mary's was made in 1818, 7 Stat. 188 (Findings of fact No. 4 and 47, Ind. Cl. Comm. Docket No. 337, *supra* n. 1, Pl. Ex. 10, Tabs A and P).

Under this 1818 treaty, the Delawares ceded to the United States all their lands in Indiana,[7] and in return the United States agreed to give them land west of the Mississippi (Art. 1, 2). It appears that no Christian Munsees and only some of the Stockbridge Munsees were in residence with the main body of the Delaware Tribe at the time the Indiana lands were ceded by the 1818 Treaty (Senate Report, *supra*, at 8-9).

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[7]The remaining Delaware lands in Ohio were ceded to the United States by separate treaties. No claim concerning those lands is involved here.

The Delawares moved to the Missouri tract where they remained until 1829. In September of that year, the Delawares entered into another treaty with the United States, which was designated as a "supplemental article" to the 1818 Treaty. 7 Stat. 327. Under the terms of this supplemental treaty the Delawares gave up their temporary residence in Missouri and accepted in lieu thereof, as their permanent residence, a reservation in Kansas. This reserve was part payment for the Delaware cession of the Indiana lands, and purported to satisfy the obligation of the United States under the 1818 Treaty to provide the Delaware Nation a permanent home west of the Mississippi (Findings of fact 5 and 6, Docket No. 337). But the trade was grossly unequal. The disparity in value between the Indiana lands ceded by the 1818 Treaty and the Kansas lands received under the 1829 Treaty later became the basis for the judgment rendered by the Indians Claims Commission in Docket No. 337. The statute distributing this award, 25 USCA §§ 1181-86, is one of the two distribution statutes being challenged in this suit.

After the Treaty of 1829 many of the Delawares that had preceded the Tribe into Missouri, and then into Arkansas, Oklahoma and Texas, moved on to the land assigned to them in Kansas. A portion of the members of the Delaware Tribe, however, remained in sections of Oklahoma and Texas. One group of Delawares, on its way from Texas to Kansas in 1853, obtained permission from the Choctaw Nation in the Anadarko area of Oklahoma to stay on its land as tenants at will (Finding of fact No. 48, Docket No. 337). Some of this group subsequently moved to the Kansas Reservation, but the majority remained behind in Oklahoma. These Delawares, together with others from Kansas and elsewhere that later joined them, maintained group identity, having chiefs and a tribal council up to the present time. The descendants of this group, who are now residing among the Wichita and Caddo Indians at Anadarko, Okla-

homa, comprise the defendant class, the Absentee Delaware Tribe of Western Oklahoma, or Absentee Delawares (Finding of fact No. 51, Docket No. 337).

On May 6, 1854, the main body of the Delaware Tribe residing on the Kansas lands entered into a treaty with the United States, 10 Stat. 1048. Under this treaty, which was not signed by any representatives of the Absentee Tribe (Defendants' Adm. No. 37, Pl. Ex. 154), the Delawares ceded their lands in Kansas, with certain exceptions, to the United States. These lands comprised the so-called hunting "outlet," extending westward into mid-Kansas, and the "residence lands" (Finding of fact No. 2, Ind. Cl. Comm. Dockets Nos. 72 and 298, *supra* n. 2, Pl. Ex. 10, Tab Q). Of the residence lands, part was reserved to the tribe as a permanent home (Art. 1), and four sections were to be conveyed to the Christian Indians who had since migrated to Kansas and were living with the Delawares in 1854 (Art. 13; Senate Report, *supra*, at 10). The remaining portion of the residence lands, the Delaware "trust lands", was ceded to the United States to be sold at public auction, with the proceeds going to the Delaware general tribal fund (Art. 2, 7); Finding of fact No. 2, Dockets Nos. 72 and 298).

However, in 1856 and 1857 the Government improperly sold the Delaware trust lands. It did not sell the lands at public auction as required by Article 8 of the 1854 Treaty, and as a result the Delawares received far less than they should have from the sale of their lands. (Findings of fact No. 4 and 8, Dockets Nos. 72 and 298). At this time ancestors of the plaintiff Kansas Delawares and of the defendant Cherokee Delawares were residing on Delaware lands in Kansas. The wrongful disposition of the Delaware trust lands in Kansas became the basis for the judgment rendered by the Indian Claims Commission in Dockets Nos. 72 and 298, and underlies the other distribution statute challenged herein, 25 USCA §§ 1291-97.

[APPENDIX]

Pursuant to the Treaty of 1854, the Delawares removed to that portion of the residence lands which the treaty had reserved for them as a permanent home (the "diminished reserve"). Then, by a treaty in 1860, 12 Stat. 1129, the United States agreed to survey the diminished reserve and to allot to each Delaware Indian an 80-acre tract in that reserve (Art. I). In addition, the treaty provided that 80-acre tracts were to be set aside for each of certain Absentee Delawares, approximated to be 200 in number, who were expected to move to Kansas and reassemble with the main body of the tribe in the near future (Art. IV).

In 1866 the Delawares entered into another treaty with the United States, 14 Stat. 793, the purpose of which was to provide for their removal to Indian Country in Oklahoma. The diminished reserve was to be sold by the United States, with the proceeds to be used for the purchase of 160 acres of land in the Indian Country for each Delaware man, woman and child who should remove thereto (Art. IV). However, all adult Delawares were to be given the opportunity under the treaty to elect whether to remove or, instead, to dissolve their relations with the Delaware Tribe and become citizens of the United States (Art. III). Each adult Delaware who thus elected to become a United States citizen was to receive fee simple title to the 80-acre tract allotted him under the 1860 Treaty, his just proportion of the Tribe's credits then held in trust (which included the proceeds of the sale of the trust lands), and also his proportion of the proceeds of the sale of the diminished reserve. Thereafter these persons were to share no further in Delaware property or annuities (Art. IX).[8]

The 1866 Treaty also provided that a registry would be made of the names of all the Delawares who thus elected to dissolve their tribal relations and remain in Kansas (Art. IX). The names of 21 adults and 49 minors appear on such

[8]Article IX of the 1866 Treaty is reproduced in Part C of the Appendix to this opinion.

registry (Pl. Ex. 44). They are the ancestors of the plaintiff class Kansas Delawares.[9]

In July, 1866, the United States and the Cherokee Nation made a treaty which provided for the relocation of civilized Indians on unoccupied Cherokee lands in the Indian country in Oklahoma. Art. IX, 14 Stat. 799. By an agreement in 1867 between the Delawares and the Cherokees (Pl. Ex. 10, Tab I), each individual of the Delaware Tribe who enrolled upon a certain register[10] acquired a life estate of 160 acres of land from the Cherokees (see Delaware Indians v. Cherokee Nation, 193 U.S. 127, 143), paid for by tribal funds,[11] and the right to become members of the Cherokee Nation. The Delaware Indians who removed to the Cherokee territory became members and citizens of the Cherokee Nation. The Delaware Indians who removed to the Cherokee territory became members and

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[9]Wanda June Weeks, the plaintiff in No. Civ. 73-586-E and representative of the plaintiff class in this consolidated action, established that she is a lineal descendant of one of the original Kansas Delaware Indians. One of the names appearing on the "Article IX Register" is Annie Grinter (Pl. Ex. 44). Annie Grinter was the great-grandmother of Wanda June Weeks (Transcript of Preliminary Injunction Hearing, 20 Pl. Ex. 15; Pl. Ex. 136a). Dorothy Frazier and Ruth Rattler, the plaintiffs in No. Civ. 74-368-D, alleged lineal descendancy through a Kansas Delaware named Lewis Ketchum (Plaintiffs Frazier and Rattler's Complaint, para. 5; Pl. Ex. 44), and established that they shared in the partial distribution of the award in Docket No. 337 (Pl. Ex. 136c and d).

[10]The names of 985 Delawares appear on this register (Defendants Secretary and Cherokee Delawares' Ex. 23, p. 73, 241. They are often referred to as "registered Delawares." The register is referred to as the "1867 Register."

[11]As noted, the 1866 Treaty, 14 Stat. 723, provided that the United States would use the proceeds from the sale of the diminished reserve to purchase the Cherokee lands (Art. IV). Actually, only the lands not allotted to the Kansas Delawares were to be sold.

The diminished reserve consisted of land which was held in severalty in 80-acre allotments and land held in common by the tribe. The 1866 Treaty provided that each Delaware removing to the Indian country

citizens of the Cherokee Nation, but they and their descendants maintained group identity (Findings of fact No. 49 and 50, Docket No. 337).[12] The descendants of this group, who today reside in northeastern Oklahoma, comprise the defendant class Delaware Tribe of Indians, or the Cherokee Delawares.

The minor children of the adult Kansas Delawares did not immediately become United States citizens at the time of their parents' election under the 1866 Treaty. Rather, Article IX of the 1866 Treaty provided that they were to be considered temporarily severed from the tribe until they attained the age of twenty-one, at which time they too could make an election either to become citizens of the United States or remove to the Cherokee Delawares in Oklahoma. Until that time their just proportion of the Delaware tribal annuities was to be paid to their parents for the children's support and education. If thus admitted to citizenship upon reaching majority, such minors were to be

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[11] (Continued)

would receive (in addition to the life estate in 160 acres of Cherokee land) the "value" of his 80-acre allotment in the diminished reserve, plus the "value" of any improvements he had made thereon (Art. III and VI). Apparently the purchase of the Cherokee lands was to be made from the proceeds of the sale of the lands held in common (Art. IV and VI). The residue of the proceeds of the sale of the diminished reserve was to be added to the general Delaware tribal fund (Art. VI), which already contained the proceeds of the sale of the trust lands. And, as previously discussed, each Kansas Delaware was to receive his proportionate share of this fund (Art. IX).

Dockets Nos. 72 and 298 concerned only the improper disposition of the trust lands under the 1854 Treaty, and did not concern this sale of the diminished reserve provided for by the 1866 Treaty. See Findings of the fact No. 2 and 4.

[12] The Kansas Delawares deny that such tribal identity has been maintained by the Cherokee Delawares and claim instead that the identity of the Cherokee Delawares was lost as a group when they became absorbed into the Cherokee Nation. We are unable to agree, and find that the Cherokee Delawares have maintained group identity, having tribal chiefs and business committees continuously until the present time.

entitled to "all the privileges and interests herein provided for the head of the family." Art. IX, 14 Stat. at 796.

By an Act approved June 22, 1874, ch. 289, 18 Stat. 146, 175, Congress appropriated funds to pay all the minor children of the adult Kansas Delawares their proportionate share of the money and stocks held in trust by the United States for the Delaware Tribe, and directed the Secretary of the Interior to issue a fee-simple title to the lands allotted them under the 1866 Treaty. By this same Act Congress also declared all such minors to be citizens of the United States, thus eliminating the requirement of an election.[18]

Docket No. 337—25 USCA §§ 1181-86

In 1951 a suit was filed in the Indian Claims Commission by two members of the Absentee Delaware Tribe of Oklahoma on behalf of all the descendants of the Delaware Nation as constituted in 1818 to redress the wrong committed by the United States under the 1818 Treaty. The Commission found that the value of the lands in the Kansas reservation given by the United States in the 1829 supplemental treaty, together with other cash payments and gratuitous expenditures determined to be proper offsets, was insufficient consideration for the Delaware cession of its Indiana lands in 1818. The petitioners were awarded $1,627,244.64 "on behalf of the Delaware Nation of Indians as constituted at the time of the Treaty of October 3, 1818." (Final Judgment, Docket No. 337).

By 25 USCA §§ 1181-86 Congress adopted a distribution plan for payment of this judgment entered in Indian Claims Commission Docket No. 337. Section 1181 of that Act provides that persons are eligible to participate in the distribution of the award if, *inter alia*, their name or the name of a lineal ancestor (1) appears on the 1906 Delaware

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[18]The pertinent provision of the 1874 statute is reproduced in Part C of the Appendix to this opinion.

per capita payroll (which covers the Cherokee Delawares); (2) is on or eligible to be on the 1940 constructed base census roll of the Absentee Delaware Tribe; or (3) appears on any available census roll or records acceptable to the Secretary, provided that such claimant shows that he is a lineal descendant of Delawares who were members of the Delaware Nation as constituted at the time of the 1818 Treaty (hereafter the "catchall" clause).[14]

The statute's effect was to permit the Cherokee Delawares, the Absentee Delawares, and the Kansas Delawares to share in the distribution of the Docket No. 337 award. Some of the judgment funds were actually distributed to members of those classes prior to the issuance of our preliminary injunction.[15] Some 1500 Munsee Indians applied

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[14] 25 USCA § 1181 provides in pertinent part:

The Secretary of the Interior shall prepare a roll of all persons who meet the following requirements for eligibility: (a) They were born on or prior to and living on September 21, 1968; (b) their name or the name of a lineal ancestor appears on the Delaware Indian per capita payroll approved by the Secretary on April 20, 1906, or (c) their name or the name of a lineal ancestor is on or is eligible to be on the constructed base census roll as of 1940 of the Absentee Delaware Tribe of Western Oklahoma, approved by the Secretary of the Interior, or (d) they are lineal descendants of Delaware Indians who were members of the Delaware Nation of Indians as constituted at the time of the Treaty of October 3, 1818 (7 Stat. 188), and their name or the name of a lineal ancestor appears on any available census roll or any other records acceptable to the Secretary. No person shall be eligible to be enrolled under this section who is not a citizen of the United States.

[15] See Plaintiff Weeks Complaint, para. 15; Defendants Cherokee Delawares' Answer, Twelfth Defense, para. 15; Defendants Secretary and Absentee Delawares' Answer para. 15; Transcript of Preliminary Injunction Hearing, 111, Pl. Ex. 15.

The claims by the Cherokee Delawares were made through the 1906 per capita payroll referred to in § 1181(b). This payroll was compiled for the purpose of distributing $150,000 appropriated by Congress as settlement for twelve lawsuits filed by the Cherokee Delawares against the United States. Act of April 21, 1904, 33 Stat. 189, 222. One of the suits concerned the hunting "outlet" in Kansas that was ceded by the Delawares to the United States under the 1854 Treaty. See United

for payments under the award in Docket No. 337, but were denied participation by the Bureau of Indian Affairs at the area level. Hearings on H.R. 5200 Before the Subcomm. on Indian Affairs of the House Comm. on Interior and Indian Affairs, 92d Cong., 2d Sess. 95-96 (March 13, 1972) (Pl. Ex. 6).

The plaintiff Kansas Delawares do not contest the Absentees' right to share in Docket No. 337 relating to the 1818 wrong but they do challenge the inclusion of the Cherokee Delawares in the distribution of this award, as well as that relating to the 1854 wrong, on two Fifth Amendment grounds. Essentially they argue that the inclusion of the Cherokee Delawares in the distribution of the award in Docket No. 337 (1) invidiously discriminates against those persons who are entitled to share in the award (i.e., the Kansas Delawares and the Absentee Delawares), and (2) deprives such persons of their property without just compensation.

Dockets Nos. 72 and 298—25 USCA §§ 1291-97

The Absentee Delawares in Docket No. 72, and the Cherokee Delawares in Docket No. 298, brought separate identical suits in the Indian Claims Commission for a general accounting upon all Delaware treaties with the United States. In previous proceedings the Commission had decided, and the Court of Claims had agreed, that both groups

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[15] (Continued)

States v. Delaware Tribe of Indians, 427 F.2d 1218, 1229 (Ct. Cl. 1970). A number of the Kansas Delawares contended that they were entitled to share in this settlement, but were denied participation on grounds similar to some of those argued in the present case, including *inter alia*, the fact that the 1904 Act (appropriating the funds) directed that payment was to be made only to the "Delaware Tribe of Indians residing in the Cherokee Nation" (33 Stat. 189, 222). See Defendants Secretary and Cherokee Delawares' Ex. 18, Ltr. of 1/25/1905, p. 2; Ltr. of 3/22/1905, p. 2. As a result, the 1906 per capita payroll (also referred to in 25 USCA § 1292(c)(1)) limited the distribution of the settlement to only those Delawares who were descendants of the

were entitled jointly to represent the entire Delaware Tribe.[16] Hence, the two cases before the Commission were consolidated.

Although originally filed as a general accounting, the issue in the case was subsequently narrowed to an accounting for that part of the 1854 Treaty concerning what was known as the Delaware trust lands. It was conceded by the Government, and the Commission found, that in 1856 and 1857 the United States did not carry out the treaty provision calling for the sale of the trust lands at public auction. The principal issue tried was how much additional monies the trust lands would have brought if the treaty had not been breached, and the lands had been properly sold at auction. The Commission determined that amount to be $1,385,617.81. It further found that the plaintiffs were entitled to recover damages of five (5) percent per annum simple interest on the principal sum from April 30, 1857

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[15] (Continued)

original 985 registered Delawares enrolled on the 1867 Register (i.e., the Cherokee Delawares). *Id.*, Ltr. of 8/14/1905, p. 1; Ltr. of 1/12/1906, p. 2.

The Absentee Delawares made their claims under § 1181(c). A 1956 Resolution of the Absentee Delaware Tribe provides that the January 1, 1940 census roll shall be used as the base for determining tribal membership. The "constructed base census roll" was formed by taking the names of persons shown to be of Delaware blood and adding thereto the names of persons, such as brothers or sisters, who were eligible to be on the 1940 census roll but were not listed (Defendants Secretary and Cherokee Delawares' Ex. 4, p. 12).

The Kansas Delawares could not, of course, base their claims under the 1906 per capital payroll. Their ancestors did not remove to the Cherokee lands and did not sign the 1867 Register of Cherokee Delawares. Nor could the Kansas Delawares claim under the Absentees' 1940 census roll. Their claims in Docket No. 337 were and are based upon the "catchall" clause in § 1181(d), since, by historical fact, they are lineal descendants of the Delaware Nation as constituted in 1818.

[16] See Delaware Tribe of Indians v. United States, 128 F.Supp. 391, 399 (Ct. Cl. 1955).

to the date of payment. As of August 31, 1969, the principal sum plus interest totaled $9,168,171.13.[17]

By 25 USCA §§ 1291-97 Congress adopted a plan for distribution of the award entered by the Indian Claims Commission in Dockets Nos. 72 and 298. Section 1292 of the Act provides only two methods by which persons may show they are eligible to share in the distribution: (1) by the 1906 per capita payroll embracing the Cherokee Delawares; and (2) by the 1940 census roll of the Absentee Delawares.[18] These two rolls, identical to those in 25 USCA § 1181(b) and (c), allow only the Cherokee and Absentee Delawares to participate in the distribution of the award in Dockets Nos. 72 and 298. Section 1292 contains no "catchall" provision similar to 25 USCA § 1181(d) that would enable the Kansas Delawares to share in the fund by showing their

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[17]On September 10, 1969, the Indian Claims Commission ordered that

> the plaintiffs shall have and recover of and from the defendant as a final judgment the sum of $9,168,171.13 plus an additional amount of damages measured by simple interest at the rate of 5% per annum on the principal sum of $1,385,617.81 from August 31, 1969 to the date of payment of the principal sum. (Final Award, Dockets Nos. 72 and 298).

[18]25 USCA § 1292 provides:

> The Secretary of the Interior shall prepare a roll of all persons who meet the following requirements:
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> (a) they were born on or prior to and were living on October 3, 1972; and
>
> (b) they are citizens of the United States; and
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> (c) (1) their name or the name of a lineal ancestor appears on the Delaware Indian per capita payroll approved by the Secretary on April 20, 1906, or (2) their name or the name of a lineal ancestor is on or is eligible to be on the constructed base census roll as of 1940 of the Absentee Delaware Tribe of Western Oklahoma, approved by the Secretary.

lineage from Delaware ancestors who were members of the tribe at the time of the wrong under the 1854 Treaty.[19]

The Kansas Delawares, reported to us as numbering over 600, note 3, supra, challenge their exclusion from § 1292 as an invidious classification in violation of the Due Process Clause of the Fifth Amendment and equal protection principles applied under the Amendment. It is this constitutional claim which we are persuaded to uphold.

The plaintiff Kansas Delawares also challenge their exclusion from distribution under § 1292 on another Fifth Amendment ground—that the exclusion amounts to a taking of their vested rights without just compensation.

Finally, they challenge the inclusion of the Absentee Delawares and the Cherokee Delawares in the distribution of the award, it again being argued that such inclusion discriminates against the Kansas Delawares and deprives them of property without just compensation.[20]

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[19]Despite the restrictive terms of the statute, plaintiff Weeks applied for participation in the award in Dockets Nos. 72 and 298 (Pl. Ex. 136a). Her application was rejected by the Bureau of Indian Affairs, and her appeal therefrom was denied by the Department of the Interior (Pl. Ex. 4).

[20]Section 1294 of the Act divides the Dockets Nos. 72 and 298 funds between the Absentee and Cherokee Delawares on a per capita basis. Ninety (90) percent of the funds apportioned to each of the two groups is to be paid out to individuals on a per capita basis. The other 10% remains to the credit of the governing bodies of each of the respective tribes to be expended for uses approved by the Secretary.

In addition to their other objections to all of the plaintiff Kansas Delawares' claims, the Absentee Delawares have moved for partial final judgment under Rule 54 F.R.Civ.P. as to the 10% of the portion of the award to remain to the credit of the Absentee Delaware Tribe of Western Oklahoma pursuant to § 1294(a). Their position is that the plaintiff Kansas Delawares have waived any claim as to said 10% of the portion of the award remaining to the credit of the Absentee Delaware Tribe, pointing to a letter introduced by plaintiffs, from the Assistant Solicitor for Indian Affairs, Department of the Interior, to

For reasons discussed in Part IV we do not agree with these latter objections of the Kansas Delawares to the inclusion of the Cherokee Delawares and the Absentee Delawares in the distribution of the awards.

We turn from this factual background to the legal issues that are raised.

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[20] (Continued)

plaintiffs' counsel (Pl. Ex. 137). The letter states that approval of attorneys fee contracts is not required on

> the specific understanding that you do not seek for your clients any part of the judgment funds in Dockets 72 and 298 which are reserved for tribal use by . . . 25 U.S.C. § 1291 *et seq*, but rather seek only their participation in the per capita distributions authorized by [25 USCA §§ 1181-86 and 1291-97]. . . .

They also argue that plaintiffs' various instruments filed in this case have not asserted a claim against the 10% portion set aside for the Absentee tribal body.

We are denying the motion for partial final judgment. Regardless of whether such waiver occurred, based on the pleadings of plaintiffs it is clear the Kansas Delawares have challenged the constitutionality of the statute and have asked that we enjoin distribution under it. See Plaintiffs' Brief on Motion for Partial Final Judgment for Absentee Delaware Tribe of Western Oklahoma, at 5 (filed 7/9/75); Plaintiffs' Proposed Findings of Fact and Conclusions of Law, at 70, 71 and 73. For reasons stated in Part V of this opinion, we must hold that 25 USCA §§ 1291-97 is not severable, and that the unconstitutional exclusion thereby of the Kansas Delawares renders the statute invalid as a whole.

With respect to the Cherokee Delawares, the position of the plaintiffs is not clear as to the 10% provision in § 1294(b). See Brief of Plaintiff in Support of Motion for Summary Judgment, at 11-12 (filed 4/16/74). Nevertheless, as stated, the plaintiffs do attack the constitutionality of the distribution statute, at least because of their exclusion, and ask that distribution under the Act be enjoined.

In § 1294(b) there is a proviso that the Secretary shall not approve the use of the funds given to the Cherokee Delaware Tribe until the tribe has organized a legal entity which in the judgment of the Secretary adequately protects the interest of its members. We have been informed by a recent certificate that the Secretary has made such finding with respect to the Delaware Tribal Business Committee. We are asked by the Cherokee Delawares to approve the finding, but that function is not within our issues or appropriate in our disposition and we are denying the motion for this relief.

II
JURISDICTION AND JUSTICIABILITY

By numerous motions the defendants have asserted that this court is without jurisdiction of the subject matter and that only nonjusticiable issues are presented. Essentially they argue that the case does not present a substantial federal question because it involves only an intra-tribal dispute not subject to judicial review. They urge two distinct theories of sovereign immunity. They argue nonjusticiability, claiming that plaintiffs raise only political questions concerning the plenary power of Congress to define Indian tribal membership, and that plaintiffs challenge nonreviewable appropriation statutes. We are not persuaded that the theories bar decision of the merits of the constitutional claims of the plaintiff Kansas Delawares.

Subject Matter Jurisdiction and The Intra-Tribal Dispute Cases

First, defendants assert that there is no substantial federal question presented, arguing that this controversy involves only intra-tribal matters not within the jurisdiction of the court, citing Groundhog v. Keeler, 442 F.2d 674 (10th Cir.); Martinez v. Southern Ute Tribe, 249 F.2d 915 (10th Cir.); Prairie Band of Pottawatomie Tribe of Indians v. Puckkee 321 F.2d 767 (10th Cir.) and Prairie Band of Pottawatomie Tribe of Indians v. Udall, 355 F.2d 364 (10th Cir.), among other cases.

The complaints allege, *inter alia*, that the statutory exclusion of the Kansas Delawares was an unconstitutional and arbitrary deprivation of valuable property rights and a denial of equal protection, depriving plaintiffs of due process in violation of the Fifth Amendment (Plaintiff Weeks' Complaint, paras. 21 and 23; Plaintiffs Frazier and Rattler's Complaint, paras. 13 and 25). These averments and the complaints as a whole present causes of action arising under the Federal Constitution and within the juris-

dictional grant in 28 USCA § 1331. See Baker v. Carr, 369 U.S. 186, 198-99. Defendants challenge jurisdiction, however, contending that the cases cited demonstrate lack of a substantial federal question because only an intra-tribal dispute is involved.

Defendants rely heavily on Groundhog v. Keeler, 442 F.2d 674 (10th Cir.). The court there dismissed a challenge to a chief's appointment under a federal statute authorizing the President to appoint the Principal Chief of the Cherokee Tribe. The court reviewed authorities recognizing "that Congress has exclusive and plenary power to enact legislation with respect to the Indian Tribes." *Id.* at 678. It was concluded that a jurisdictional dismissal was appropriate since the claim was "so lacking in substance and so contrary to well established law" that it afforded no substantial basis for federal jurisdiction, citing California Water Service Co. v. City of Redding, 304 U.S. 252, 255, and Ex Parte Poresky, 290 U.S. 30, 32. See 442 F.2d at 678, n. 7.

We recognize the validity of the conclusion upholding congressional power to authorize the appointment of the chief. However, our cases are not disposed of by such reasoning. We do not find any authority unmistakably sustaining congressional authority to exclude one group of Indian descendants from benefits conferred broadly on others who apparently stand on equal footing. No previous decisions make it clear that the constitutional claims before us are obviously without merit. Levering & G. Co. v. Morrin, 289 U.S. 103, 105.

For similar reasons we find the remaining authorities and arguments unpersuasive as a challenge to jurisdiction. *Martinez, supra,* and *Puckkee, supra,* involved controversies between individual Indians and tribal entities over the official actions of the tribe. The cases are readily distinguishable since the challenges posed there were to a tribal decision or policy, and not to federal statutes. *Martinez* concerned an individual attack on a tribal decision excluding

the plaintiff from tribal membership; *Puckkee* challenged the distribution of an Indian Claims Commission award where the distribution scheme fixed by the tribal council excluded the plaintiffs; and the *Prairie Band* case sought to bar approval of a tribal distribution plan. As the cases involved essentially inter-tribal disputes over decisions by tribal authorities, the courts found no substantial federal question arising under 28 USCA § 1331. See *Martinez*, 249 F.2d at 919; *Puckkee*, 321 F.2d at 770; *Prairie Band*, 335 F.2d at 367. In contrast, this action involves a substantial challenge to congressional rather than tribal action.[21]

We are persuaded that the Kansas Delawares present substantial constitutional claims under the Due Process Clause—claims deserving consideration on their merits. And since we are also convinced that the claims are justiciable, as explained below, we feel the case is properly here under 28 USCA § 1331. See Baker v. Carr, 369 U.S. at 198; see also, Powell v. McCormack, 395 U.S. 486, 512-13.[22]

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[21] Although the controversy here might be denominated one as to "tribal membership" in the broad sense of the term, that alone does not render it an "intra-tribal' dispute. The *Martinez* opinion itself recognized that the question of tribal membership for disposition of funds could, as a result of federal legislation, become a matter of federal rather than tribal supervision. See 249 F.2d at 918, 920.

[22] In their answers defendants deny the jurisdictional amount allegations. However, the objection has not been pressed by argument or brief and we find it without merit.

As discussed above, this case properly proceeds as a Rule 23(b)(1)(B) class action. The decisions in Snyder v. Harris, 394 U.S. 332 and Zahn v. International Paper Co. 414 U.S. 291 impose prohibitions against aggregation of claims in class actions. Those decisions, however, concern Rule 23(b)(3) class actions and present no obstacle to the aggregation of claims when a common and undivided interest is present. Gallegher v. Continental Insurance Co., 502 F.2d 827, 831 (10th Cir.); see also Berman v. Narragansett Racing Association, 414 F.2d 311, 314-15 [1st Cir.), cert. denied, 396 U.S. 1037. Should the plaintiff class of Kansas Delawares prevail in this litigation, their right to share in the benefit of the award will have been determined. Still, a formula will have to be determined by statute and no individual recoveries can be, or are now, sought. See *Berman, supra* at 315-16.

Sovereign Immunity

The defendants' motion to dismiss the suit as against the United States has been granted since there is no consent to such a suit. [Order, Nov. 1, 1974]. The situation differs, however, with respect to the case against the Secretary. The doctrine of sovereign immunity does not insulate federal officers from suit when the case seeks to enjoin threatened action by a federal officer under an unconstitutional statute. See Larson v. Domestic and Foreign Corp., 337 U.S. 682, 690. We therefore rejected the governmental sovereign immunity defense as to the Secretary.

In our Weeks case it is objected that the tribal business committees which are sued are immune from suit. It is true that the Indian Nations are exempt from suit without congressional authorization. United States v. U.S. Fidelity & Guaranty Co., 309 U.S. 506, 512; Turner v. United States, 248 U.S. 354, 358. Nor may a tribe be sued indirectly by suing tribal officers or the United States as trustee or guardian of the tribe. Barnes v. United States, 205 F.Supp. 97, 100 (D. Mont.).

However, the Weeks complaint alleges as to the Cherokee Delaware and Absentee Delaware committees that each of the members of the committee (being separately named) is a Delaware Indian and that they are each a representative of their respective subclasses, the Cherokee Delawares and the Absentee Delawares. The Indian defendants are not immune from suit in their individual capacities. See Chemah v. Fodder, 259 F.Supp. 910, 914 (W.D. Okla.). We feel we may entertain the suit against the individually named Indian defendants, in their individual capacities, and that we may also properly recognize them as representatives for class action purposes under Rule 23(b)(1)(B) and 23(b)(2) and enter a proper declaratory judgment of the right of the individuals constituting the classes. We grant no relief against the tribes or their tribal authorities as such, and our judgment should not be construed as a binding adjudication affecting them.

[APPENDIX]

The Argument of Non-Justiciability and the Plenary Power of Congress Over the Status of Indian Tribes

Defendants argue that only non-justiciable issues are presented due to implication of the plenary power of Congress to define Indian tribal membership.

Without doubt, plenary authority has been exercised by Congress from the beginning over tribal relations of the Indians and the power has been deemed a political one, not subject to control by the judicial department. Lone Wolf v. Hitchcock, 187 U.S. 553, 565; see also National Indian Youth Council v. Bruce, 485 F.2d 97, 99 (10th Cir.). However, we are cautioned that "[m]uch confusion results from the capacity of the 'political question' label to obscure the need for case-by-case inquiry." Baker v. Carr, 369 U.S. 186, 210-11. As in other contexts, there is no blanket rule as to justiciability where legislation affecting the status of Indians is challenged *Id.* at 215-16. Analysis must be made of the threads of the political question doctrine to determine whether they catch this controversy. *Id.* at 211. Generally, we must first consider whether the constitutional claim presented and relief sought are of the type permitting judicial resolution, and second, whether there may be a "political question" that is not justiciable because of the separation of powers. Powell v. McCormack, 395 U.S. 486, 516-17.

In considering the first question, we note that the constitutional claims essentially are that the distribution statutes violate the Fifth Amendment's protections against unlawful taking and against denial of due process, implicating equal protection principles. See Weinberger v. Wiesenfeld, ___ U.S. ___, 43 U.S.L.W. 4393, 4394, n. 2. Such a claim of discriminatory classification is of a type regularly considered and decided by the courts. As the Court observed in rejecting the non-justiciability argument in Baker v. Carr, 369 U.S. at 226:

> Judicial standards under the Equal Protection Clause are well developed and familiar, and it has been open to courts since the enactment of the Fourteenth Amendment to determine, if on the particular facts they must, that a discrimination reflects *no* policy, but simply arbitrary and capricious action.

Moreover, the relief sought is not unfamiliar. An injunction against threatened unconstitutional action by a governmental officer is within the proper equitable remedies of the court, see Lane v. Pueblo of Santa Rose, 249 U.S. 110, 113-14, and the separate remedy of a declaratory judgment is also familiar. Powell v. McCormack, 395 U.S. 486, 517-18. We are convinced that the first general test of justiciability is satisfied.

Our second inquiry—whether there is a non-justiciable "political question" because of constitutional separation of powers—involves more detailed considerations. We must consider whether there is a bar to judicial disposition because of a constitutional commitment of the issue to a coordinate political department, lack of judicially discoverable and manageable standards for resolving the question, or an impossibility of decision without an initial policy determination of a kind clearly for non-judicial discretion, *inter alia*. See Baker v. Carr, 369 U.S. 186, 217; see also Powell v. McCormack, 395 U.S. 486, 518-19.

Of course, there is explicit constitutional authorization for congressional action in dealing with Indian affairs in the provision for Congress "To regulate commerce . . . with the Indian Tribes." And the functions relating to treaties conferred on the President and the Senate by Art. II, § 2, Cl. 2, have often been the source of power to deal with the Indian tribes. See Morton v. Mancari, 417 U.S. 535, 551-52; McClanahan v. Arizona State Tax Commission, 411 U.S. 164, 172, n. 7; see also Lone Wolf v. Hitchcock, 187 U.S. 553, 565-66.

The authority conferred upon the other branches for dealing with the Indian Tribes by treaty is involved indirectly in this case in the sense that the historical background for the Delaware awards in question include several treaties with the Tribe, as discussed earlier. There is, however, in the distribution statutes no present policy determination of the sort involving the treaty making function. Instead these recent enactments deal with equitable distribution following a judicial award, and proper classifications for the distribution. There is the additional view that enactments dealing with Indians involve the relationship of a ward to his guardian, and there is an element of such a relationship touched on by § 1294.[23] Baker v. Carr, 369 U.S. 186, 215; see also Lone Wolf v. Hitchcock, 187 U.S. 553, 567. However, the challenge to the classifications made here does not refer to the guardianship relation, nor to the discretionary exercise of the guardianship function by the Congress.

We have touched earlier on the availability of familiar standards for deciding the constitutional claims presented here. We are persuaded that the claims invoke familiar due process and equal protection principles. In several instances the courts have reached the merits of due process claims of a similar sort. *E.g.*, United States v. Jim, 409 U.S. 80; Ute Indian Tribe v. Probst, 428 F.2d 491, 498 (10th Cir.), cert. denied, 400 U.S. 926; Simmons v. Seelatsee, 244 F.Supp. 808, 815 (E.D. Wash. 1965 (three judge court), aff'd mem., 384 U.S. 209; see also McCurdy v. Steele, 353 F.Supp. 629, 637-38 (D. Utah 1973), rev'd on other grounds, 506 F.2d 653 (10th Cir.).

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[23]We refer to the provision in § 1294(a) and (b) that 10% of the award be withheld for subsequent advancement, expenditure, etc., for any purpose authorized by the tribal governing bodies of the Cherokee and Absentee Delawares and approval by the Secretary of the Interior. 25 USCA §§ 1294(a), (b). This portion of the statute is affected by our decision only because of our conclusion that the distribution statute, which has no separability clause, must be held invalid as a whole. See Parts III and V, *infra*.

Nor do any of the remaining considerations underlying the political question doctrine apply. Decision on the precise constitutional issues does not involve any disrespect for a political decision by a coordinate branch. And, of course, there is no danger of embarrassment by multifarious pronouncements by two branches as in foreign affairs. See Baker v. Carr, 369 U.S. at 211-13, 217.

For these reasons we are satisfied that, on analysis, the political question doctrine does not bar consideration of the constitutional claims of the Kansas Delawares. They may invoke jurisdiction of the court under USCA § 1331 to decide the validity of the statutory exclusion and inclusions in light of established constitutional limitations. "[T]he power of Congress over Indian affairs may be of a plenary nature; but it is not absolute." United States v. Tillamooks, 329 U.S. 40, 54; see also United States v. Klamath Indians, 304 U.S. 119, 123; Chippewa Indians of Minnesota v. United States, 301 U.S. 358, 375-76; United States v. Creek Nation, 295 U.S. 103, 109-10; Stephens v. Cherokee Nation, 174 U.S. 445, 578; F. Cohen, Handbook of Federal Indian Law 91 (orig. ed. 1942).

The Objection to Justiciability on the Theory of Nonreviewability of Appropriate Statutes

The Absentee Delawares advance a final argument that nonjusticiable questions are involved because appropriation statutes are challenged, relying on United States v. Price, 116 U.S. 43 and United States v. Jordan, 113 U.S. 418. The plaintiff Kansas Delawares reply that appropriation statutes are not involved. They say that the determination to pay the awards was made in earlier, separate appropriation acts, Pub.L. No. 88-635, ch. IX, Oct. 7, 1964, 78 Stat. 1033-34; Pub.L. No. 91-167, ch. IX, Dec. 26, 1969, 83 Stat. 453, and that the challenged distribution statutes are not appropriation acts. Without deciding this point we consider the argument on the basis that the distribution statutes under attack are a part of the appropriation procedure.

We conclude that the reasoning of the *Price* and *Jordan* cases does not apply. The cases involved determinations that restitution should be made for property taken for wartime purposes and by unlawful taxation, respectively. In both cases the government challenged a prior congressional determination by statute of the government's obligation. In *Jordan* the Court stated that the clear import of the statute was that the amount specified had been collected contrary to the tax regulations involved, and that this congressional determination, made on recommendation of the Secretary of the Treasury, could not be challenged in the subsequent suit. 113 U.S. at 423. Similar reasoning was relied on in the *Price* case.

We have also noted Buchanan v. Patterson, 190 U.S. 353; United States v. Louisville, 169 U.S. 249, and Kruszewski v. United States, 163 F.2d 884 (7th Cir.), cert. denied, 333 U.S. 880, which recognize the principles of *Price* and *Jordan*. In none of the cases, however, is there support for the inference that a statute, because it involves an appropriation function, is unreviewable if a substantial constitutional claim is made that an invidious or irrational classification or exclusion is made by the statute. And, of course, the fact that the spending power is involved does not bar consideration of constitutional issues. See Helvering v. Davis, 301 U.S. 619, 640-41 (1937); United States v. Butler, 297 U.S. 1, 62-78 (1936); Veazie Bank v. Fenno, 8 Wall. 533, 541 (1869); cf. Flast v. Cohen, 392 U.S. 83, 127 (Harlan, J., dissenting). We feel that involvement of the appropriation function is no bar to hearing the merits of the constitutional claims of those excluded by a classification asserted to be invidious and irrational.

Thus, we are convinced that substantial constitutional claims are asserted and that they deserve disposition on their merits. The claims are proper for consideration under familiar judicial standards and none of the facets of the political question doctrine bars judicial review.

III

CONSTITUTIONALITY OF THE EXCLUSON OF THE KANSAS DELAWARES BY 25 USCA §§ 1292 and 1294

The plaintiff Kansas Delawares claim that the exclusion barring their participation in the award in Dockets Nos. 72 and 298, redressing the 1854 wrong, is irrational and invidious under the Due Process Clause, and the equal protection principles incorporated therein; and also that the statute takes their vested individual rights without just compensation. We find merit in plaintiffs' first claim, not agreeing however with their unlawful taking theory.[24]

In assessing the claim of the Kansas Delawares that the exclusion amounts to an irrational and invidious classification, we follow equal protection principles applied under the Fourteenth Amendment. See Weinberger v. Wiesenfeld, 420 U.S. 636, 638 n. 2, Johnson v. Robinson, 415 U.S. 361, 364-65 & n. 4. Since no suspect classification or fundamental interest is involved, our inquiry is whether the classification excluding the Kansas Delawares is rationally related to a legitimate governmental interest, or whether it invalidly excludes a group standing on equal footing with others benefited. Jimenez v. Weinberger, 417 U.S. 628, 636-37; see also Weinberger v. Salfi, ___ U.S. ___, ___ (slip opinion, 17); United States Department of Agriculture v. Moreno, 413 U.S. 528, 533; Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 172-73; Richardson v. Belcher, 404 U.S. 78, 81-84; McDonald v. Board of Election, 394 U.S. 802, 809.

We approach the question mindful of the presumption of constitutionality that the statute carries. Flemming v. Nestor, 363 U.S. 603, 617. As noted, the award in Dockets Nos. 72 and 298 seeks to redress a wrong to the Delaware

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[24]It is convenient to address plaintiffs' just compensation claim in Part V of this opinion dealing with equitable jurisdiction and remedies.

tribe from the improper sales of tribal lands in 1856 and 1857. Since the excluded Kansas Delawares trace their descendancy from the injured tribe as of that time, a substantial question as to the rationality of the exclusion is raised. We turn, therefore, to the various justifications for the classifications that have been suggested or may be conceived. McDonald v. Board of Election, 394 U.S. 802, 809.

The defendants argue that there are several justifications that serve as rational bases for the classifications drawn in 25 USCA §§ 1292 and 1294. When the matter was before the Congress the arguments of the Cherokee and Absentee Delawares for the restrictive classifications centered heavily on their objections to claims of the Munsee groups and the delaying effect those claims had caused in distribution of the award in Docket No. 337 relating to the 1818 wrong. Due to the importance of the legislative history and its focus on the Munsee groups, we will first consider the legislative source materials.[25]

The Legislative History and the Munsee Groups

As noted, the Kansas Delawares did share in the award in Docket No. 337, redressing the breach of the 1818 Treaty, by virtue of a catchall provision in the distribution statute including all persons who "are lineal descendants of Dela-

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[25]It is proper to examine the legislative history of a statute to see if it discloses a rational basis for the classifications made by the statute, see, *e.g.*, Richardson v. Belcher, 404 U.S. 78, 82; United States v. Maryland Savings-Share Inc. Corp., 400 U.S. 4, 6, as well as other grounds of justification that may be conceived. McDonald v. Board of Election, 394 U.S. 802, 809.

This court on its own motion, and with notice to the parties, requested and obtained a legislative history covering the two distribution statutes (25 USCA §§ 1181-86 and 1291-97) involved in this case through the assistance of the Administrative Office of the United States Courts and the congressional staffs. These materials were filed with the clerk of the court for examination and comments by the parties.

ware Indians who were members of the Delaware Nation of Indians as constituted at the time of the Treaty of October 3, 1818 . . ." 25 USCA § 1181(d). Likewise the legislation originally introduced for the purpose of distributing the funds appropriated to pay the award in Dockets Nos. 72 and 298, redressing the breach of the 1854 Treaty, would have included the Kansas Delawares since it proposed to bring current and amend the distribution rolls developed pursuant to 25 USCA § 1181 so as to include all persons who were lineal descendants of members of the Delaware Tribe as it existed in 1854. H.R. 5200, 92d Cong., 1st Sess. §2 (March 1, 1971); S. 1067, 92d Cong., 1st Sess. §2 (March 2, 1971).[26]

However, the bill which was ultimately passed by Congress, H.R. 14267, 92d Cong., 2d Sess. (1972) (as amended), narrowed the distribution provision. The distribution scheme finally enacted followed the scheme for Docket No. 337, 25 USCA § 1181, except for the crucial difference that the third or catchall provision in § 1181(d) which had allowed the Kansas Delawares to share was omitted from § 1292. Only persons who could trace their ancestry to a described 1906 payroll (*i.e.*, the Cherokee Delawares), or whose name or whose ancestor's name was on, or was eligible to be on, the constructed base census roll as of 1940 of the Absentee Delawares, were included under this distribution provision.

We have examined the legislative history relating to this change in the distribution provisions. The change was made after the Cherokee Delawares and Absentee Delawares objected to the distribution provisions in the bills originally introduced. The substitute distribution provision

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[26]The use of the updated roll in H.R. 5200 was recommended by the Department of Interior. See House Committee Report accompanying H.R. 14267, H.R. Rep. No. 92-1081, 92d Cong., 2d Sess. 2 (1972) (Defendants Secretary and Cherokee Delawares' Ex. 6).

which was adopted was essentially that proposed by the two tribal groups.[27]

The Cherokee and Absentee Delawares advanced several reasons to Congress for rejecting the distribution provision in the bills originally introduced and adopting instead their narrower proposal referring to the 1906 roll and the constructed roll as of 1940.[28] The underlying problem, which was cited repeatedly, concerned the Munsee groups. The Munsees were conceded to share common origins with early Delawares in New Jersey, Pennsylvania and Maryland, to whom they were considered related and with whom they formed one cultural group. At least some officials in the Bureau of Indian Affairs had taken the position that certain Munsee Indians should qualify to share in the award in Docket No. 337 under the catchall provision in 25 USCA § 1181 covering all lineal descendants of the 1818 Delaware Nation. The Bureau had indicated that these Munsees might apply for participation in the distribution under this provision and extended various administrative deadlines in

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[27]See Hearings on H.R. 5200 Before the Subcomm. on Indian Affairs of the House Comm. on Interior and Insular Affairs, 92d Cong., 2d Sess. 31 ff.; (March 13, 1972) (Pl. Ex. 6) [hereinafter cited as House Subcomm. Hearings]; Hearings on H.R. 5200, H.R. 14267 Before the Subcomm. on Indian Affairs of the House Comm. on Interior and Insular Affairs, 92d Cong., 2d Sess. 4 (May 8, 1972) (Pl. Ex. 7).

[28]See *e.g.*, Letter from Bruce M. Townsend, Chairman of the Delaware Tribal Business Committee (Cherokee Delawares), to Congressman Wayne H. Aspinall, Chairman, House Comm. on Interior and Insular Affairs, Nov. 16, 1971, attached to House Subcomm. Hearings, *supra* n. 27, at 9 ff.; Statement of Louis L. Rochmes, Attorney for the Delaware Tribes, March 13, 1972, attached to House Subcomm. Hearings, *supra* n. 27, at 45 ff.; House Subcomm. Hearings, *supra* n. 27, at 10, 14-18, 21-22, 25, 46-49, 71-74 (testimony of Bruce M. Townsend and Louis L. Rochmes); Hearings on H.R. 14267, H.R. 5200 Before the Comm. on Interior and Insular Affairs, 92d Cong., 2d Sess. 4-5 (May 10, 1972) (Pl. Ex. 8); Hearings on S. 3113, S. 1067 S. 2249 and S. 2298 Before the Subcomm. on Indian Affairs of the Senate Comm. on Interior and Insular Affairs, 92d Cong., 2d Sess. 42-49, 60-61, 69-71 (July 21, 1972) (Pl. Ex. 5) (testimony of Bruce M. Townsend, Harold Pruner and Lawrence Snake).

order to allow the Munsees to make such applications. It appears that some 1500 Munsees ultimately applied to participate in the award in Docket No. 337, that all 1500 applications had been rejected by the Bureau at the area level, and that some 739 were still pending on appeal at the Bureau in Washington at the time of the hearings on legislation to distribute the awards in Dockets Nos. 72 and 298. See House Subcomm. Hearings, *supra* n. 27, at 95-96.

The Cherokee and Absentee Delawares objected that the Munsee Indians, including the Christian Munsees, were not, in fact, descendants of the Delaware Nation as it was constituted in 1818 or in 1854, and that the Bureau's actions in their behalf were unfounded. See House Subcommittee Hearings, *supra* n. 27, at 56-57, 72. Moreover, they objected that there was Bureau solicitation of the Munsees to apply and that subsequent extensions of deadlines for the Munsees' benefit, coupled with the volume of appeals produced when the Munsee applications were rejected, had unreasonably delayed the complete distribution of the funds in Docket No. 337. They argued that the use of similar "lineal descendants" provision in the new distribution act for the award in Dockets Nos. 72 and 298 would lead to a repetition of the Munsee problem and that a precise definition of the identity of those entitled to share in the latter award was therefore necessary. See the Letter of Mr. Townsend and Statement of Mr. Rochmes cited n. 28 *supra*. Other reasons for the restriction of the award to the Cherokee and Absentee Delawares were also urged and they are considered below in discussing the various bases said to justify the exclusion of the Kansas Delawares.

The Munsee situation was undoubtedly a major factor in Congress' decision to drop the catchall "lineal descendants" provision in § 1292. However, the legislative history indicates that Congress was never apprised that adoption of the Cherokee and Absentee Delaware proposals for limiting the distribution provisions would have the effect of

excluding a group of people, such as the Kansas Delawares who were unquestionably lineal descendants of the Delaware Nation of 1854, who had lived on the Kansas Delaware lands, and who had not participated in any judgment to another tribe.[29]

As stated, the Congress adopted basically the position of the Absentee and Cherokee Delawares that the award in Dockets Nos. 72 and 298 be divided between their two groups. The committee reports accompanying the pending proposal H.R. 14267 stated that "[t]he Delaware Indians are divided into two groups: the Delaware Tribe, and the Absentee Delaware Tribe of Western Oklahoma." H.R. Rep. No. 1081, 92d Cong., 2d Sess. 1 (May 22, 1972); S. Rep. No. 92-1126, 92d Cong., 2d Sess. 1 (Sept. 14, 1972) (Defendants Secretary and Cherokee Delawares' Ex. 6 and 7 respectively). The House Report states that the recommendations of the Department of Interior (which had proposed up-dating the Docket No. 337 roll to include persons who are lineal descendants of the Delaware Tribe as it existed in 1854) were strenuously opposed by both groups (the

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[29]See the statement by Mr. Rochmes, tribal attorney for the Absentee and Cherokee Delawares in response to questions by the committee (House Subcomm. Hearing, *supra* n. 27, at 78-80), Appendix to this opinion, Part A.

There is evidence in our record that at least some of the Cherokee and Absentee Delawares, themselves, were unaware of the existence of the Kansas Delawares at the time they testified before Congress. Mr. Townsend, the Chairman of the Delaware Tribal Business Committee (Cherokee Delaware) and one of the principal witnesses before Congress urging the adoption of a distribution scheme utilizing only the 1906 and 1940 rolls, testified in the course of this litigation that he was unaware of the existence of the Kansas Delawares, as such, until after the passage of 25 USCA §§ 1291-97, when it was discovered that the Kansas Delawares were precluded from sharing in the award under the statute. Transcript of Preliminary Injunction Hearing, 76, 91, Pl. Ex. 15. Mr. Townsend further testified that he did not think the question of the Kansas Delawares' sharing in the award in Dockets Nos. 72 and 298 was ever brought before or considered by Congress in the course of the legislative hearings on distribution legislation for the award. *Id.* at 82-85.

Absentee and Cherokee Delawares), and that "the Indian position is, in the opinion of the committee, a defensible one." *Id.* at 2. Neither the reports nor the floor proceedings of both Houses disclose further reasons or discussion for the classifications in the statute as enacted. See 118 Cong. Rec. S 15063 (daily ed. Sept. 18, 1972); 118 Cong. Rec. H 8700 (daily ed. Sept. 25, 1972).

From our examination of the legislative history we find that the Congress was specifically requested by the Absentee Delawares and the Cherokee Delawares to delete the catchall provision, and that Congress made the decision in response to the urging of those groups. On the record before us, we find that neither Congress nor its committees were made aware that the limitation of distribution to the two rolls would exclude a group which had lived on the Kansas Delaware lands and which could trace their Delaware descendancy as the Kansas Delawares do.[30] Instead the focus was on the Munsee Indian groups, including the Christian Indians,[31] and paramount consideration was given to the Munsee situation in considering the proposed change in the distribution statute.

While we have no question of statutory interpretation before us making germane the legislative history and intent in the usual context, we nevertheless feel these legislative materials are relevant in connection with defendants' claim that the Congress was aware that the classification would exclude some Indians who could ethnologically claim to be Delawares.[32] It is disturbing that the Congress was apparently not aware of the Kansas Delaware group and we are persuaded that it was not the intent of Congress to exclude a group such as the Kansas Delawares from the distribution.

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[30]See Appendix to this opinion, Part B.

[31]See Article 13 of the 1854 Treaty, 10 Stat. 1048.

[32]See Defendants' Consolidated Proposed Findings of Fact and Conclusions of Law, p. 63 (as amended Oct. 3, 1975).

Suggested rational bases for the exclusion of the Kansas Delawares in 25 USCA §§ 1292 and 1294

We turn to the several justifications advanced by defendants as supporting the rationality of the exclusion of the Kansas Delawares from participation in the award redressing the 1854 wrong.

First, defendants rely on the references in 25 USCA § 1292 to the 1906 Cherokee Delaware roll and the 1940 Absentee Delaware roll. They say that reference to these objective standards in preference to an ethnological standard of lineal descendancy was intentionally chosen to eliminate the possibility of wrongful payment due to deliberate misrepresentations or misunderstanding, to avoid delay, and to eliminate the confusion that had arisen in distribution of the Docket No. 337 award. See Defendants' Consolidated Proposed Findings of Fact and Conclusions of Law, 64. We cannot agree, concluding that the argument will not withstand analysis of the statutes and factual circumstances, or the constitutional protections against discriminatory classifications made clear by the Supreme Court.

We have noted earlier that complaints made to Congress in connection with delay and controversy, among other things, were directed at the Munsees,[38] and not at the Kansas Delawares. The testimony indicated that approximately 300 Kansas Delawares shared in the earlier Docket No. 337 award redressing the 1818 wrong (Transcript of Preliminary Injunction Hearing, 103-04, Pl. Ex. 15), and the legislative history before us reflects no complaints of delay or controversy in connection with the participation by these Kansas Delawares in the distribution of that award.

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[38]See Letter of Mr. Townsend and Statement of Mr. Rochmes cited n. 28 *supra*.

Moreover, in response to requests for deadlines to avoid delay, the enactment providing for distribution of the Dockets Nos. 72 and 298 award included limitations of four months for applications for enrollment, 60 days for rejection by the Secretary, 30 days for appeal, and 60 days for determination of an appeal, 25 USCA § 1293. This protection against delay and controversy moots the substance of defendants' arguments. In these circumstances the suggested considerations of administrative convenience cannot support the exclusion of the Kansas Delawares. The arguments must fall in view of the admonition in Stanley v. Illinois, 405 U.S. 645, 656:

> The establishment of prompt efficacious procedures to achieve legitimate state ends is a proper state interest worthy of cognizance in constitutional adjudication. But the Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones.

We are also unconvinced by the suggested rationale of avoidance of spurious claims. It is true that §1292 refers to two existing 1906 and 1940 rolls. However, the suggested potential of spurious claims is not eliminated since the standards of entitlement were not confined within the compass of objective records. The Secretary was required by §1292 to prepare a distribution roll of Absentees living on October 3, 1972, who were United States citizens, and who could show that:

> (2) their name or the name of a lineal ancestor is on or is eligible to be on the constructed base census roll as of 1940 of the Absentee Delaware tribe of Western Oklahoma, approved by the Secretary. (25 USCA § 1292(c)(2))

It is clear that under the §1292 criteria an Absentee Delaware could apply for enrollment under §1293[34] and partake in the distribution of the award if he could show that his name or that of his "lineal ancestor" was on or was "eligible to be on" the constructed base census roll as of 1940. Thus it was open to an Absentee to show entitlement by ethnological proof of Delaware blood lines even though neither his name nor that of his ancestor actually appeared on the described roll.[35] This proof is not limited to objective records. Moreover, we note that both Cherokee and Absentee Delawares could show entitlement for §1292 purposes if the name of their "lineal ancestor" was on the described rolls—a showing that again would involve tracing Delaware lineage subsequent to and outside the described rolls.

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[34]Applications are required to be made by § 1293 to an Area Director. The applications are considered by the Secretary under the § 1292 criteria to determine eligibility for listing on the distribution roll of persons entitled to share in the distribution of the award.

[35]The method of preparation of the Absentee "constructed base census roll as of 1940" included listing persons shown to be of Delaware blood who were *eligible* to be on the 1940 roll of Caddos and Absentee Delawares, but were not listed. The method of preparation of the "constructed base census roll as of 1940 of the Absentee Delaware Tribe of Western Oklahoma approved by the Secretary of the Interior," 25 USCA § 1181(c), is described in the Senate Report accompanying H.R. 16402 as follows (S.Rep. No. 1518, 90th Cong., 2d Sess. 12 (1968) (Defendants Secretary and Cherokee Delawares' Ex. 4)):

> Membership in the Absentee Delaware Tribe is governed by a resolution adopted by the tribe on December 22, 1956, and approved by the Acting Assistant Commissioner on July 30, 1957. The resolution provides that the January 1, 1940, census roll shall be used as the base for determining membership in the tribe. That roll is the census of the Wichita and Affiliated Bands of Indians (Caddo and Absentee Delaware). In constructing the base census roll referred to in section 1(c) of the proposed bill, the tribe has taken from the 1940 roll the names of persons shown to be of Delaware blood and has included the names of persons, such as brothers and sisters, who were eligible to be on the 1940 roll but were not listed. The base roll which has not yet been approved lists 331 individuals. The executive committee estimates that the membership roll as of January 1, 1967, will contain approximately 800 names.

The prevention of spurious claims is recognized as a legitimate governmental interest in connection with classifications. See Jimenez v. Weinberger, 417 U.S. 628, 636. Here, however, as in *Jimenez*, the effect of the statute is to create subclasses which are treated unequally. For example, members of the Absentee Delaware subclass can show entitlement to participate by proof of Delaware lineage, independent of any roll, through proof that an ancestor was "eligible" to be on the constructed base census roll as of 1940, although not listed. But members of the other subclass, consisting of those like the Kansas Delawares, are denied the opportunity to make a showing of entitlement through proof of Delaware lineage in any way on the suggested rationale that the statute furthers the interest of prevention of spurious claims. The rationale is untenable "since the potential for spurious claims is exactly the same as to both subclasses." Jimenez v. Weinberger, *supra*, 417 U.S. at 636.[36]

Thus, in the circumstances before us, we cannot agree that considerations of the avoidance of potential fraud, delay and controversy, or of easing administrative burdens, justify the discriminatory exclusion of the Kansas Delawares. See Jimenez v. Weinberger, *supra*, 417 U.S. at 635-37; Stanley v. Illinois, 405 U.S. 645, 658; Reed v. Reed, 404 U.S. 71, 76.

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[36]The dimensions of the problem viewed from the numbers of the three groups involved do not indicate that the Kansas Delawares would present more difficulties than the other groups. It was testified before us that the Bureau of Indian Affairs has advised that 7,765 Cherokee Delawares and 1,808 Absentee Delawares had been approved for participation in the award at the time of the preliminary injunction hearing in March, 1974 (Transcript of Preliminary Injunction Hearing, 109, Pl. Ex. 15). As earlier noted, it has been reported to us that the identities of approximately 678 Kansas Delawares were known to the plaintiff Weeks (see note 3 *supra*). Approximately 300 Kansas Delawares shared in the Docket No. 337 award, according to the testimony (Transcript of Preliminary Injunction Hearing, 103-04). And, as stated the complaints as to delay were related to the Munsee groups, not to the Kansas Delawares.

Second, it was argued before Congress and the court that a proper reason for limitation of distribution of the award to the Cherokee Delawares and Absentee Delawares is found in the final award of Indian Claims Commission in Dockets Nos. 72 and 298. The argument is that whereas the award in Docket No. 337 was made to "the petitioners on behalf of the Delaware Nation of Indians as constituted at the time of the Treaty of October 3, 1818", the award in Dockets Nos. 72 and 298 was made to the "plaintiffs," who were the Cherokee and Absentee Delawares.

We cannot agree with the inference drawn from the form of the award. In its first finding of fact in Dockets Nos. 72 and 298 the Commission stated:

> 1. Plaintiffs, Absentee Delaware Tribe of Oklahoma et. al. in Docket No. 72, and the Delaware Tribe of Indians in Docket No. 298, are entitled under the Act of August 13, 1946, 60 Stat. 1049, *to jointly represent the entire Delaware Tribe in its claim against the United States.* (emphasis added)

In addition the opinion of the Commission refers to its earlier determination (2 Ind. Cl. Comm. 253), that "these two groups were entitled jointly to represent the entire Delaware Tribe." 21 Ind. Cl. Comm. 344, 345.

The finding of the representative capacity in which the plaintiff groups brought suit accords fully with the procedure laid out by the Indian Claims Commission Act, 60 Stat. 1049, 25 USCA §§ 70-70v. The Commission's function is defined as hearing and determining claims "on behalf of any Indian tribe, band, or other identifiable group of American Indians" 25 USCA § 70a. This function is basically to identify the injured tribal entity, making plain the time of the wrong and the injured group. Cherokee Freedmen, v. United States, 195 Ct. Cl. 39, 52. "[T]he ancestral group 'owns' the claim, and present-day Indian groups are before the Commission only on behalf of the ancestral entity."

Turtle Mountain Band of Chippewa Indians v. United States, 490 F.2d 935, 954 (Ct. Cl. 1974). In view of the Commission's finding and the procedural scheme we must read the reference to the "plaintiffs" in the Commission's award in Dockets Nos. 72 and 298 as being to them in a representative capacity on behalf of the entire Delaware Nation as compensation for the 1854 wrong.

Defendants offer a related argument that the law requires that awards of the Indian Claims Commission be made to existing Indian tribes and not to individual descendants of the tribe as it existed at the time of the wrong, relying on Minnesota Chippewa Tribe v. Untied States, 315 F.2d 906 (Ct. Cl.). This purported rule of law is suggested as a rational basis for the statutory exclusion. We must disagree, concluding that the Court of Claims decisions do not support the position of defendant.

Before the Congress defendants pointed to statements in Minnesota Chippewa Tribe v. United States, 315 F.2d 906, 913-14 (1971):[37]

> Tribal lands are communal property in which the individual members have no separate interest which can pass to their descendants who are no longer members of the group. (*Id.* at 913)
>
> At least in such proceedings the Indian Claims Commission Act requires that the awards be made, not to individual descendants of tribal members at the time of the taking, but to the tribal entity or entities today. (*Id.* at 914)

The court's opinions since *Minnesota Chippewa* make it clear that the Commission's functions are limited to identifying the injured tribal entity, making plain the time of the wrong and the injured group. See Cherokee Freedmen v. United States, 195 Ct.Cl. 39, 52 (1971). The court has

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[37]See the Statement of Mr. Rochmes cited n. 28 *supra*.

stated that the Commission is to leave to the Congress and its agents the decision of the composition of the injured tribe and the designation of those entitled to participate in the judgment. *Id.*

In Red Lake & Pembina Bands v. Turtle Mountain Band of Chippewa Indians, 355 F.2d 936, 944 (Ct. Cl. 1965), the court discussed the *Minnesota Chippewa* case and others and the Commission's proper function:

> The court held that, since the claim was on behalf of the entity, the award must run to the entity, not to the individual persons or descendants. This was to make it clear, first, that the claim is a group not an individual demand, and, second, that nothing in the Indian Claims Commission Act bars any current member of the represented group from benefiting or requires the inclusion of descendants who are not now such members. Those questions are left open by the Act. The determinations of 'how the award is to be paid and precisely who can participate in an award' remains for Congressional and administrative determination—the Indian Claims Commission Act standing wholly aside from that extra-judicial resolution. Peoria Tribe of Indians v. United States, supra. *The form of the award should not pre-determine the persons who will benefit from the award to the group—as it might do if there were binding references to descendants of past members or comparable individualization of the decree.* (emphasis added)

And in Cherokee Freedman v. United States, 195 Ct. Cl. 39 (1971), the court made clear the limitations on the functions of the Commission and the Court of Claims again:

> A third separate problem in this family of related topics is the composition of the particular entity or group in whose favor an award is made under the Claims Commission Act—whether specific individuals,

classes of persons, or subgroups saying that they are members or components of the prevailing group are entitled to participate in the judgment. Those questions we have consistently held, from the beginning of litigation under the Act, to be beyond the competence of the Commission and this court; they are reserved for Congress or for authorized administrative resolution when the award is paid. (*Id.* at 46)

* * *

We have always taken pains to assure that any group or persons claiming a right to participate (at least colorably) in a judgment under the Act not be totally excluded, either by the form of the award or by the restrictive nature of the entity to which the award goes in name. Since Congress (or its agent) is to settle disputes as to the composition of, or membership in, the group entitled to the money, the Commission's judgment should not bar an individual or entity from urging before the other branches a right to share on the ground of such membership. (*Id.* at 48) (emphasis added.)

* * *

The third protective device is to make clear—as we do now and as the Commission should also do in its final decision—the identity of the injured tribal entity. That is well within the authority of court and Commission under the Claims Commission Act (see McGhee, Yuchi, Red Lake and Pembina Bands, and the other decisions cited supra), and it will be that entity whose composition will be decided by Congress or its designee. (*Id.* at 52)

* * *

The award itself need not say in precise terms that it is for the benefit of the Cherokee Nation "as it existed or was constituted before 1893 (or from 1872-1893)" so long as it is plain that that is the time and

> the group involved. *The other branches of government can then decide the composition of the Cherokee tribe as of that period.* (Id. at 52) (emphasis added.)

See also Turtle Mountain Band of Chippewa Indians v. United States, 490 F.2d 935, 954 (Ct. Cl. 1974).

Hence, we are satisfied that the Commission's authority does not extend to designating the beneficiaries of its awards. This is further reason why we feel the Commission did not intend or make a designation of the Cherokee and Absentee Delawares as the beneficiaries of the award in Dockets Nos. 72 and 298, and that its reference to the "plaintiffs" was merely in the sense of their representative capacity of the injured tribal entity. In this case neither the award nor the decisions of the Court of Claims relied on bears on the question of designation of beneficiaries of the Commission's awards; and they may not serve here as a rational basis for the statutory classifications made by Congress.

Third, defendants argue that rationality of the exclusion lies in the fact that the Kansas Delawares gave up any right to share in future Delaware tribal assets by voluntarily electing to sever their tribal membership pursuant to Article IX of the 1866 Treaty with the Delaware Indians, 14 Stat. 793, 796.[38]

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[38] Defendants point to the last sentence of Article IX describing the effect of an election by a Delaware to become a United States citizen:

> There shall be granted to each of the Delawares who have thus become citizens, a patent in fee simple for the lands heretofore allotted to them, and, if they do not remove with the nation, their pro rata share of all annuities and trust property held by the United States for them, the division to be made under the direction of the President of the United States, after which such persons shall cease to be members of the Delaware tribe, and shall not further participate in their councils, nor share in their property or annuities.

Defendants contend that a similar severence of tribal membership and membership rights was made by statute in 1874 (18 Stat. 146,

We are not persuaded that any previous waiver or surrender of rights prejudices the Kansas Delawares with respect to this award. Article IX of the 1866 Treaty expressly provided that any Delaware electing to become a citizen would receive patents and his "just proportion, in cash or in bonds, of the cash value of the credits of said tribe, principal and interest, then held in trust by the United States." 14 Stat. at 796. Had the United States fulfilled its obligations in good faith under the 1854 Treaty, the Kansas Delawares on electing citizenship would each have received their just proportion of the increased proceeds of the land sales in 1856 and 1857. The award in Dockets Nos. 72 and 298 was clearly intended to redress the injury and diminution of proceeds from those sales.

We find it a strained interpretation of the 1866 treaty to say that the Kansas Delawares waived any rights to share in such a future award as is involved here. The language of the treaty does not impel such a result and there was no showing that the Indian victims were aware of the wrong done them in the sale of the Delaware lands. "The construction, instead of being strict, is liberal; doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of a weak and defenseless people, who are wards of the nation, and dependent wholly upon its protection and good faith." Choate v. Trapp, 224 U.S. 665, 675; see Antoine v. Washington, 420 U.S. 194,

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[38] (Continued)

175) as to Kansas Delawares who were minors in 1866. (Plaintiffs disagree, arguing that the statute did not have the effect of severing the minors' membership in the Delaware Tribe. However we feel we need not resolve this question in view of our disagreement with the defendants' basic position that adults' or minors' rights in connection with the award in Dockets Nos. 72 and 298 were surrendered or waived by the earlier acts of their ancestors or by the intent of the 1874 statute and the 1866 Treaty provisions.

200; Choctaw Nation v. Oklahoma, 937 U.S. 620, 631.[39] We cannot accept the waiver argument as a justification for the exclusion.

Fourth, it is argued that rationality for the distribution statute may be found in Article 8 of the 1854 Treaty with the Delawares, 10 Stat. 1048, 1050. This provision states that:

> Congress may, at any time, and from time to time, by law, make such rules and regulations in relation to the funds arising from the sale of said lands, and the application thereof for the benefit and improvement of the Delaware people, as may, in the wisdom of that body, seem just and proper.

Defendants argue that this reservation of legislative power by the Congress permits the statutory exclusion of the Kansas Delawares from participation in the award.

Again, construing the treaty as the Indians would have understood it, Choctaw Nation v. Oklahoma, *supra*, 397 U.S. at 631, the inference that any use made of this reserved power must be sustained, is unjustified. Article 8 cannot be said to have reserved or conferred power to prejudice Indian rights without regard to constitutional limitations. We have earlier noted that the plenary power of Congress to regulate Indian affairs is subject to constitutional limitations, see United States v. Klamath Indians, 304, U.S. 119, 123; see also United States v. Tillamooks, 329 U.S. 40, 54; McCurdy v. Steele, 353 F.Supp. 629, 637 & n.

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[39]What has been said also disposes of a related point concerning Article IX of the 1866 Treaty. It is argued that Article IX limited the Kansas Delawares to their just proportion of credits "*then held in trust* by the United States (emphasis added), and precludes their asserting any rights thereafter to such funds, including the award here. Again, the inference of a waiver or surrender of a right to future redress by the award is untenable. This treaty provision likewise does not impel such an interpretation, and it would violate the cited long-standing canon of construction of Indian treaties. And, as noted, there was no showing of awareness by the Indians of the wrong.

12 (D. Utah), rev'd on other grounds, 506 F.2d 653 (10th Cir.). The provisions of Article 8 likewise may not be construed to reserve a power immune from constitutional limitations.

Fifth, defendants say that the plenary power of Congress over Indian tribes and tribal property cannot be limited by treaties so as to prevent repeal or amendment by a later statute. Defendants contend that the provisions of the later statute—here the distribution enactment—superseded prior treaty provisions and statutes, citing, *inter alia*, Choate v. Trapp, 224 U.S. 665, 670-71; Lone Wolf v. Hitchcock, 187 U.S. 553, 566; Thomas v. Gay, 169 U.S. 264; and Ward v. Racehorse 163 U.S. 504. Defendants argue, contrary to plaintiffs' position, that in light of this unilateral power of Congress to amend or modify treaties and statutes, no "vested rights" were created in favor of the Kansas Delawares by the 1866 Treaty. Defendants conclude that any rights of the Kansas Delawares have been lawfully abrogated by the distribution statute, 25 USCA § 1292, under authority recognized in United States v. Jim, 409 U.S. 80, and Gritts v. Fisher, 224 U.S. 640.

We cannot agree with the inferences drawn. The issue is not whether such power is held by the Congress to abrogate treaties or to control distribution of tribal property. Instead, the issue is whether the exercise of power in this area by the distribution statute comports with the safeguards of the Due Process Clause. For we are convinced that the congressional power to abrogate treaties is circumscribed by the limitations in other parts of the Constitution. See United States v. Klamath Indians, supra, 304 U.S. at 123; see also United States v. Tillamooks, 329 U.S. 40, 54; McCurdy v. Steele, 353 F.Supp. 629, 637 & n. 12 (D.Utah), rev'd on other grounds, 506 F.2d 653 (10th Cir.).

Moreover, we feel that the dispute between the parties over whether any "vested rights" were conferred on the Kansas Delawares by the treaties need not be resolved to

dispose of this argument concerning the power to amend treaties. The plaintiffs constitutional claim under the Due Process Clause and equal protection principles need not be grounded on a "vested right." See Shapiro v. Thompson, 394 U.S. 618, 627, n. 6; see also Goldberg v. Kelly, 397 U.S. 254, 262 & n. 8. Regardless of whether the Government was obligated to grant relief for the historic wrong to the Delawares, the relief having been undertaken and the award and appropriation having been made, we feel that the statute drawing classifications is nevertheless subject to due process and equal protection limitations. See *id.*; Griffin v. Illinois, 351 U.S. 12, 18. For even if they have no "vested" or contractual right, the Indian claimants may not be discriminated against by invidious classifications or by classifications having no rational relation to a legitimate legislative goal. See Weinberger v. Salfi, ___ U.S. ___, (slip opinion at 20).

Finally, defendants urge that reference to the 1906 and 1940 rolls of the Cherokee and Absentee Delawares, respectively, represents a rational congressional decision to distribute the award to modern day tribal entities and their members, rather than to lineal descendants of the injured tribe as constituted in 1854. Defendants also contend that reference to the described rolls represents a congressional exercise of recognized power to define tribal membership for purposes of the distribution. See Defendants' Consolidated Proposed Findings of Fact and Conclusions of Law, at pp. 100, 104, 105, 113.[40] We are unable to

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[40]In actuality, modern tribal membership of one of the benefited groups, the Absentee Delawares, is not followed in the statutory distribution under 25 USCA § 1292(c)(2). *E.g.*, a person born after July 30, 1957, must have 1/8 Delaware blood in order to be recognized as a member of the Absentee Delaware Tribe. See Defendant Absentee Delawares' Ex. 9 and 28. However, for distribution under § 1292(c)(2) such person need only show that his lineal ancestor's name is on or eligible to be on the constructed base census roll of the Absentees as of 1940, in which case he may thus participate in the distribution though he has less than 1/8 Delaware blood.

accept these propositions as a rational justification for the exclusion.

We start from the point that the Indian Claims Commission Act and its underlying policies are neutral, not favoring any particular pattern of distribution of the Commission's awards. See Cherokee Freedmen v. United States, 195 Ct. Cl. 39, 46-52 (1971). Nevertheless, it must be remembered that the claim is that of the injured ancestral tribe and present day groups are before the Commission only on behalf of the ancestral entity. Turtle Mountain Bank of Chippewa Indians v. United States, 490 F.2d 935, 954 (Ct. Cl. 1974). While in the absence of some provision to the contrary, the right of individual Indians to share in tribal property generally depends on tribal membership, see Halbert v. United States, 283 U.S. 753, 762-63; United States v. Jim, 409 U.S. 80, 82, we are convinced that distribution of awards under the Act for historic wrongs is not controlled by technical rules of ownership, descent and distribution. Distribution is for congressional disposition, consistent with constitutional limitations applied in light of the purposes of the Indian Claims Commission Act, the treaties and the relief the award affords for injury to the ancestral tribe.

In this instance the claim of the Kansas Delawares to participation in the award has the foundation of their descendancy from the tribe injured at the time of the historic wrong. The wrongful sales of the tribe's lands in 1856 and 1857 diminished the amount of the resulting fund which had been established for the benefit of the Delaware "people" by Article 7 of the 1854 treaty with the tribe, 10 Stat. 1048, 1050, as the traty repeatedly makes clear. And further, the Kansas Delawares' position is re-enforced by Article IX of the 1866 treaty with the tribe, 14 Stat. 793, 796, recognizing the Kansas Delawares' right, *inter alia*, on electing to take United States citizenship, to their "just proportion" of the tribal credits then held in trust by the United States—credits that would have included

the proper measure of payment from sales of the trust lands, but for the wrong to the tribe.

The award in question was made to redress that historic wrong to the entire Delaware Tribe under the 1854 treaty, and the Cherokee and Absentees Delawares were representing "the entire Delaware Tribe in its claim against th United States." See Findings of Fact 1, 23 and 24, Dockets Nos. 72 and 298, 21 Ind. Cl. Comm. 344; opinion in said dockets, 21 Ind. Cl. Comm. at 345, 347. The Kansas Delawares are descendants of the injured ancestral tribe and some 300 of them recently shared in the award under the Act in Docket No. 337 for the similar historic wrong of 1818.

In view of the redress which was the goal of the statute and the award, and in view of the Kansas Delawares' standing being equal in the context of that goal to that of the Absentee and Cherokee Delaware groups benefited, Jimenez v. Weinberger, 417 U.S. 628, 637; United States Department of Agriculture v. Moreno, 413 U.S. 528, 537, we cannot sustain the unequal classification and the arbitrary exclusion it makes. Against the history, the statutes and the treaties involved, the designation of the two "modern groups" for exclusive distribution of the award is a discrimination reflecting no policy, but simply arbitrary and capricious action. Baker v. Carr, *supra*, 369 U.S. at 226.

We doubt that the Congress actually intended or realized that exclusion of a group such as the Kansas Delawares would result. But in any event, the resulting unequal treatment rests on no foundation rationally related to a legitimate governmental interest serving the purposes of the Act. Jimenez v. Weinberger, 417 U.S. 628, 636-38; see Weinberger v. Salfi, ____ U.S. ____, ____ (slip opinion, 17); United States Department of Agriculture v. Moreno, 413 U.S. 528, 533; Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 172-73; Richardson v. Belcher, 404 U.S. 78, 81-84.

Giving the statutory classification the presumption of constitutionality as we must, and considering all justifica-

tions for the classification, we nevertheless must hold that the resulting exclusion of the Kansas Delawares violates the fundamentals of due process and equal protection.

IV

VALIDITY OF THE CHALLENGED INCLUSIONS OF THE CHEROKEE DELAWARES AND THE ABSENTEE DELAWARES IN DISTRIBUTION OF THE AWARDS

Plaintiff Kansas Delawares further argue that the Cherokee Delawares are not entitled to participate in the awards in either Docket No. 337 or Dockets Nos. 72 and 298, and that the statutes providing for distribution of both awards, 25 USCA §§ 1181-86 and 1291-92, violate their Fifth Amendment rights insofar as they include the Cherokee Delawares in the provisions for distribution of both awards. Plaintiffs also claim that the Absentee Delawares are not entitled to share in the award in Dockets Nos. 72 and 298, relating to the 1854 wrong. They say that the distribution statute for that award, 25 USCA §§ 1291-97, violates their Fifth Amendment rights insofar as it includes the Absentee Delawares.[41]

We disagree with these positions taken by the Kansas Delawares and conclude that the challenged distribution provisions are valid insofar as they included the Cherokee and Absentee Delawares.[42]

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[41]Plaintiffs do not challenge the right of the Absentee Delawares to share in the award in Docket No. 337, redressing the breach of the 1818 Treaty. See Plaintiffs' Proposed Finding of Fact No. 31; Brief of Plaintiff in Support of Motion for Summary Judgment at 80; Plaintiffs' Reply Brief on Constitutional Issues at 2.

[42]We realize that as a result of our conclusion in Part III that the classifications made are invalid, and our conclusion in Part V that we must hold 25 USCA §§ 1291-97 invalid as a whole, our consideration of plaintiffs' additional challenges to the statute may be viewed as unnecessary. However, because of the desirability of a prompt decision on all of these constitutional issues, and of economy in efforts, we feel we should decide all these claims on their merits.

The Inclusion of the Cherokee Delawares

Plaintiffs first claim that the Cherokee Delawares are Cherokee Indians by blood and hence have no right to share in awards to the Delaware Tribe. They argue that the Delawares who removed to the Indian Territory as contemplated by the Treaty of 1866, 14 Stat. 793, (*i.e.*, the "registered Delawares") became incorporated into the Cherokee Nation under the 1867 Articles of Agreement between the Cherokees and Delawares (Pl. Ex. 10, Tab I).[43] The Kansas Delawares contend that the effect of the 1867 Agreement was to abolish the Delaware Tribe as a political entity, with the registered Delawares individually becoming citizens of the Cherokee Nation and the children of these registered Delawares thereafter born becoming native blood Cherokees, citing Cherokee Nation v. Journeycake, 155 U.S. 196, and Delaware Indians v. Cherokee Nation, 193 U.S. 127, *inter alia*.

Plaintiffs conclude that the Cherokee Delaware class, being composed of present living descendants of children of registered Delawares born after the 1867 agreement, is not a class of persons who are descendants of members of the Delaware Nation as it existed in 1818 or 1854, in terms of Indian tribal ancestry, citing Halbert v. United States, 283 U.S. 753. They argue that the Cherokee Delawares are native blood Cherokee citizens who never acquired any interest in the Delaware tribal claims for the 1818 or 1854

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[43]The Agreement between the Delawares and the Cherokees provided in part as follows:

> On the fulfillment by the Delawares of the foregoing stipulations, all the members of the tribe, registered as above provided, shall become members of the Cherokee Nation, with the same rights and immunities, and the same participation (and no other) in the national funds, as Native Cherokees, save as hereinbefore provided. And the children hereafter born of such Delawares so incorporated into the Cherokee Nation, shall in all respects be regarded as native Cherokees.

wrongs, and that they are not entitled under any constitutionally permissible rationale, to participate in the awards for either the 1818 or 1854 wrongs to the Delaware Tribe. They challenge the provisions for distribution of the awards to the Cherokee Delawares as invidious discrimination against those entitled to share in the awards, and claim deprivation of property without just compensation in violation of the Fifth Amendment.

We cannot agree that constitutional limitations prohibit distribution of an Indian Claims Commission award to all lineal descendants of the injured tribe. As stated, the claim to redress under the Act is that of the ancestral tribe and present day groups are before the Commission only on behalf of the ancestral entity. Turtle Mountain Band of Chippewa Indians v. United States, 490 F.2d 935, 954 (Ct. Ct. 1974). The function of Congress is to decide the composition of the injured tribe at the time of the wrong. Cherokee Freedmen v. United States, 195 Ct. Cl. 39, 52 (1971). We are convinced that a legislative decision to distribute an award to the lineal descendants of the injured tribe at the time of the wrong, regardless of their current tribal membership status, is well supported, considering the redress which is the goal of the Indian Claims Commission Act.

One ground for plaintiffs' argument is that the award should be treated as tribal property and governed by principles of communal ownership, applied in light of tribal history subsequent to the wrong.[44] We have already concluded

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[44]Essentially, plaintiffs' argument is this: The move to the Cherokee Nation did not abolish the Delaware national fund (which was diminished as recognized by the awards in Docket No. 337 and Nos. 72 and 298). After the 1867 move, the registered Delawares in Oklahoma and the Kansas Delawares were owners of the national fund, and, since this ownership was communal in nature, it could not be devised, transferred or inherited. On the death of the registered Delawares, their ownership interest terminated. The children of the registered Delawares, not being of Delaware blood, but of Cherokee blood, did not inherit from their Delaware Indian parents any interest in the Delaware national

that distribution of awards under the Act, which is for congressional decision, is not controlled by technical property concepts. We are satisfied that the Congress has sound ground for deciding to distribute an award to lineal descendants of the tribe injured by the wrong. See Cherokee Freedmen v. United States, 195 Ct. Cl. 39, 46-52. And as discussed in Part V, *infra*, we conclude that there are no "vested rights" related to the awards in question which must be observed in the distribution.

Plaintiff Kansas Delawares argue further that all Cherokee Delawares who, pursuant to 25 USCA §§ 991-98, participated in the award in Indian Claims Commission Docket No. 173 of some $14,000,000 to the Cherokee Tribe, are barred by 25 C.F.R. § 101.4 from participating in the awards in question here. The regulation provides in pertinent part that:

> An Indian holding equal rights in two or more tribes can share in payments to only one of them and will be required to elect with which tribe he wishes to be en-

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[44] (Continued)

fund or in any claims which the prior existing Delaware tribe owned for breaches of treaties by the United States. The succeeding generations of descendants of the registered Delawares are also Cherokees, since they must claim through parents who were native Cherokees, the rule being that children belong to the tribe of their parents, not of their grandparents. Halbert v. United States, 283 U.S. 753 (1931). Plaintiffs conclude that the Cherokee Delawares, as Cherokees, have not succeeded to any rights of the prior existing Delaware tribe, and may not share in the national fund or in the claims which have matured into the awards in Docket No. 337 or Dockets Nos. 72 and 298.

We have rejected similar arguments that the distribution of awards, which is for congressional decision, is controlled by technical property concepts. Likewise, such contentions on the legal status of Cherokee Delawares and their rights under laws of descent are not dispositive of the constitutional claims. In any event, we are satisfied that despite the policy arguments against the Cherokee Delawares sharing in both Cherokee and Delaware awards, there was a sufficient nexus between the Cherokee Delawares and the injured ancestral tribe by descendancy for Congress rationally to include the Cherokee Delawares in the distribution of the awards redressing the 1818 and 1854 wrongs.

rolled and to relinquish in writing his claims to payments to the other.

More broadly, plaintiffs maintain that this rule against dual eligibility for tribal benefits is a long standing public policy. See Mandler v. United States, 52 F.2d 713, 714 (10th Cir.); F. Cohen, Handbook of Federal Indian Law, 137 (orig. ed. 1942). In view of these principles the Kansas Delawares assert there is no rational basis for the congressional decision permitting the Cherokee Delawares to share in the award to redress the Delaware wrongs of 1818 and 1854.

We must disagree. By its own terms 25 C.F.R. § 101.4 applies in circumstances where an Indian holds equal rights in two or more tribes and prevents sharing in payments made to two tribes. Even if controlling over the distribution statutes, the policy and regulation may be viewed as inapplicable on the theory that Indians, like the Cherokee Delawares, participating in the awards here are not receiving payments of two tribes, but that the participation in these awards brings compensation based on earlier circumstances when their ancestors were members of another injured tribe—or at least the Congress could rationally so conclude.

But in any event the policy and the regulation may be changed by statute, subject to constitutional limitations which we feel do apply to an exercise of congressional power over Indian legislation. We see no violation of constitutional limitations arising from a change in policy concerning sharing in two tribal benefits.

The Inclusion of the Absentee Delawares

The plaintiff Kansas Delawares further argue that the Absentee Delawares may not be validly included in distribution of the award in Dockets Nos. 72 and 298 redressing the 1854 wrong. They say that the Absentees' ancestors were not with the main body of the Delaware tribe at the time of the 1854 wrong and were not harmed by breach of the 1854 Treaty.[45] Essentially they contend that entitlement to the benefit of a treaty or to compensation for its breach depends on residency with the tribal entity at the time of entering into the treaty and at the time of the wrong, respectively, and on being subject to the obligations of tribal membership, citing Eastern Band of Cherokee Indians v. United States, 117 U.S. 288; McGhee v. Creek Nation, 122 Ct. Cl. 380, cert. denied, 344 U.S. 856; Prairie Band of Potawatomi Indians v. United States, 165 F.Supp. 139 (Ct. Cl. 1958); and Miami Tribe of Oklahoma v. United States, 281 F.2d 202 (Ct. Cl. 1960). And the Kansas Delawares conclude that the unjustified inclusion of the Absentees in distribution of the award dilutes the interest of those rightfully entitled to such funds and constitutes a taking of their property without just compensation.

We are unpersuaded by the arguments. It is true that Indians who sever their tribal relationship and separate from the tribe lose their right to participate in tribal assets. Miami Tribe of Oklahoma v. United States, 281 F.2d 202, 213 (Ct. Cl. 1960). However, an Indian group absent from a main tribal body at the time of a wrong may still

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[45] Although plaintiffs do not concede that the Absentee Delawares were members of the scattered Delaware Nation in 1854, they contend that even if they were, they were not in Kansas with the main body of the tribe which made the 1854 Treaty and were not residing on the lands which were ceded by the treaty. It is further claimed that those Absentees who did enjoin the main body of the tribe in Kansas prior to 1854 are ancestors of present members of either the Cherokee Delaware class or the Kansas Delaware class.

be recognized by the tribe as retaining tribal membership, and may have a claim to participate in an award redressing a wrong to the tribe. Delaware Tribe of Indians v. United States, 128 F.Supp. 391, 399 (Ct.Cl.1955). Hence it is relevant to consider what the policy of the Delaware Tribe was in 1854 with respect to recognizing a continued relationship with the Absentees.

We feel the historical materials before us are not conclusive as to whether the Absentees were considered by the tribe to have retained their membership at the time of the breach of the 1854 Treaty. The Kansas Delawares rely on historical documents allegedly showing that, as a result of absenting themselves from the main tribal body in Kansas, the Absentees had, by tribal law, ceased to participate in the tribal councils and to have any interest in tribal property.[46] Defendants, on the other hand, point to several treaty provisions and authoritative discussions of Delaware history indicating that the Absentees were recognized as members of the tribe by its main body in 154. See Article IV of the 1860 Treaty between the United States and the

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[46]Plaintiffs cite Pl. Ex. 32 (Letter from John G. Pratt, U.S. Indian Agent, to Thomas Murphy, Supt. of Indian Affairs, July 14, 1868) in support of this proposition. They further allege that the Absentees received no portion of the annuities paid to the main body of the tribe and did not participate in any of the treaty benefits accruing to the main body of the tribe, citing Pl. Ex. 32, *supra*; Pl. Ex. 145-B (Letter from John G. Pratt to Thomas Murphy, Nov. 27, 1866); Pl. Ex. 64 (Letter from A. H. McKisick, Wichita Agent, to Elias Rector, Supt. of Indian Affairs, Oct. 21, 1857, excerpt from Report of the Comm'r of Indian Affairs, 1857); Pl. Ex. 149 (Excerpt from "Registry, Allotment, Valuation, etc., Delaware Diminished Reserve, Treaty, July 4, 1866"). In particular, they argue that the Delaware national fund, into which the proceeds from the sale of the lands under the 1854 Treaty were placed, was paid out per capita to members of the Delaware nation by 1893 and that the Absentees never received any part of such fund.

There was an objection as to authentication of plaintiffs' exhibit 32, cited above, which appears to be good. Nevertheless, even considering the exhibit, our conclusion remains the same in rejecting plaintiffs' arguments in view of the treaty provisions and other documents cited which serve as an adequate and rational basis for the decision of Congress to include the Absentees in the distribution of the award.

Delaware Tribe, 12 Stat. 1129, 1130-31; S. Rep. No. 1518, 90th Cong., 2d Sess. 7-11 (1968).[47] Moreover, we note that the Court of Claims found from its examination of the tribal history that "the rule and policy of the Delawares [in 1854] was and had been to recognize all Delawares everywhere, who had maintained their identity as Delawares, as members of the tribe." Delaware Tribe of Indians v. United States, *supra*, 128 F.Supp. at 399.

We feel this view is persuasive, and that the Congress also was entitled to consider it in drawing the distribution statutes, along with the other historical evidence. Thus, although the historical materials are not conclusive, there is support for the position that the Delaware tribe in 1854 recognized the Absentees as members of the tribe. In these circumstances we cannot say the Congress had no rational basis for the inclusion of the Absentees in the provisions for distribution for the award to redress the 1854 wrong.

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[47]The defendants say the Treaty of May 30, 1860 between the United States and the Delaware Tribe, 12 Stat. 1129, is evidence of such a contemporaneous understanding as to the structure of the Delaware tribe. Article I of that treaty referred back to Article 11 of the 1854 Treaty, 10 Stat. 1048, 1050, which had provided for the possible future survey and individual assignment of the residence lands left to the Delawares under the 1854 Treaty. Article I went on to provide that those lands should now be surveyed "and to each member of the Delaware tribe there shall be assigned a tract of land containing eighty acres. . . ."

Article IV of the 1860 Treaty, 12 Stat. 1129, 1130-31, went on to make provision for the Absentee Delawares in the following terms:

> Whereas some years ago a good many of the Delawares went down among the Southern Indians, and as there are still about two hundred of them there, and as they have reason to believe they will return soon, it is hereby agreed that eighty acres each be set apart for them, to be allotted to them as they return, and certificates to be then issued to them, in the same manner as to those now within the reservation, and in every respect to be governed by the same rules and regulations as prescribed for the government of the lands reserved by the preceding articles, that until they return the allotments set apart for belong (sic) to the nation in common.

Defendants contend that, by this 1860 Treaty, the ancestors of the Absentee Delaware class were recognized as members of the Delaware

V

EQUITABLE JURISDICTION AND REMEDIES

Having concluded that the classifications made in 25 USCA §§ 1291-97 for distribution of the award redressing the 1854 wrong, resulting in the exclusion of the Kansas Delawares, are invalid, it remains to consider the proper remedies and to determine whether other portions of the distribution statute may be upheld and continued in effect. These questions lead us to the remaining disputes between the parties.

First, defendants argue that if plaintiffs' allegations of a taking of their property without just compensation and without due process are true, they may be entitled to recover money from the Treasury and must present their complaint in such a suit in the Court of Claims or in the district courts. They point to 28 USCA §1505 conferring jurisdiction on the Court of Claims to hear Indian claims against the United States; to the Tucker Act, 28 USCA § 1491, granting that court jurisdiction of claims against the United States founded on the Constitution, among other

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47 (Continued)

Tribe with rights co-extensive with all other tribal members. They allege that these rights included full rights to tribal land, annuities, trust funds and interest accruing to the Delawares under former treaties, including the 1854 Treaty.

However, plaintiffs assert that Article IV of the 1860 Treaty was not an offer to allow the Absentees to share in the *Delaware national fund* if they returned, but only an offer of an *eighty acre allotment* to each Absentee if they returned. In any event, plaintiffs urge that the Absentees did not, in fact, return in response to the opportunity offered by the treaty, thus refusing to rejoin the tribe and forfeiting their right to receive land in Kansas. Plaintiffs cite Pl. Exs. 32 and 145-B in support of this contention. Further, plaintiffs argue that the 1860 Treaty is irrelevant because, under the controlling cases, merely being recognized as a part of the tribe or Nation is not sufficient grounds to establish the Absentees' claim to share in proceeds relating to the breach of the 1854 Treaty, citing Prairie Band of Potawatomi Indians v. United States, *supra*, 165 F.Supp. 139; and Miami Tribe of Oklahoma v. United States, *supra*, 281 F.2d 202.

things; and to jurisdiction conferred on the district courts by 28 USCA § 1346 to hear such claims for amounts not exceeding $10,000. Defendants argue that the only constitutional question presented is whether the challenged statutes have deprived plaintiffs of their resort to those forums; that there is no such foreclosure of remedies to recover by actions at law there; and that injunctive relief and invalidation of the statute would therefore be improper, citing Regional Rail Reorganization Act Cases, 419 U.S. 102; United States v. Causby, 328 U.S. 256; and Hurley v. Kincaid, 285 U.S. 95. See Defendants' Consolidated Proposed Findings of Fact and Conclusions of Law, at pp. 71-75.[48]

We feel that reliance on Regional Rail Reorganization Act Cases, *supra*, is misplaced. The case involved admittedly existing property rights of the rail companies, their owners and claimants against the bankrupt estates. The Court defined the major issues as being whether an action at law under the Tucker Act will be available to recover any deficiency of constitutional dimension in compensation for the takings allegedly to be effected by the Act, and if the Tucker Act remedy is available, whether it is adequate. 419 U.S. at 121. The Court held that the Tucker Act remedies were not withdrawn, and that they were adequate to recover compensation for any "constitutional shortfall" resulting from conveyances required and, therefore, that the Regional Rail Reorganization Act was not an unconstitutional reorganization plan. *Id.* at 154-55.

However, the case involved no question of the existence of obvious property rights or vested rights of the various parties, *id.* at 122, 137, and the Tucker Act remedy was held available for monetary recovery for any inade-

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[48]Defendants argue that plaintiffs could maintain a class action in the Court of Claims under procedures analogous to those under Rule 23 F.R.Civ.P. See Quinault Allottee Association v. United States, 453 F.2d 1272 (Ct. Cl.). Thus they say no multiplicity of suits and no other like inequitable result would occurr by litigation in that forum, or in a district court suit under 28 USCA § 1346.

quacy in compensation under the Act's reorganization procedures. On the contrary, we feel that here the plaintiffs have no property or vested right in the Indian Claims Commission award in question and, hence, no remedy to recover specific monetary compensation on behalf of any plaintiff or the class of Kansas Delawares. As explained earlier, while we uphold the plaintiffs' claim under the Due Process Clause and equal protection principles incorporated by it, that constitutional claim grounded on irrational classifications is available without the premise of property or vested rights in the award.[49] We do not feel that plaintiffs have any such property or vested rights in the award as may premise a constitutional claim entitling them to specific monetary recovery under the Tucker Act. As pointed out below, after the award is entered Congress subsequently determines the beneficiaries of the award and there may not be a constitutional claim for monetary recovery with respect to the award as entered. Cf. United States v. Jim, 409 U.S. 80, 83.

For like reasons United States v. Causby, 328 U.S. 256, and Hurley v. Kincaid, 285 U.S. 95 are not in point, since they also involved admittedly existing property rights whose taking was compensable by recoveries against the United States.

Since we conclude that the plaintiffs here have no property or vested rights in the award, we feel that they have no remedy at law for specific monetary recovery under the Tucker Act, although they do have a good claim for protection against the irrational statutory classification and exclusion. We are persuaded we should consider and

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[49]Defendants argue that the Court of Claims does give plenary consideration to claims of arbitrary and invidious discrimination, relying on Fredrick v. United States, 507 F.2d 1264, 1266, (Ct. Cl.), saying that all claims of plaintiffs must be put before the Court of Claims. Again, however, the *Fredrick* case involved a claim of a statutory right to employment and monetary recovery which distinguishes it from our case where no such rights in the award exist.

uphold that constitutional claim on its merits and grant equitable and declaratory relief, there being no full and adequate remedy at law and no reason to avoid a prompt decision. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 585; see Aircraft & Diesel Corp. v. Hirsch, 331 U.S. 752, 780.

Our conclusion that the plaintiffs here have no vested or property rights in the award, as they claim, is based on the special procedures of the Indian Claims Commission, discussed earlier. Under those procedures the Commission's awards determine only the identification of the injured tribal entity, making plain the time of the wrong and the injured group, and do not pre-determine the persons who will share the award; later the Congress determines the composition of the injured tribal entity and the beneficiaries of the award. See Cherokee Freedmen v. United States, 195 Ct. Cl. 39, 48, 51-52. In addition, the Congress decides on procedures for the subsequent distribution and whether portions of the fund should be held in trust for the Indians' benefit. *E.g.*, 25 USCA §§ 1293 and 1294. In light of these undecided points remaining for congressional decision after entry of the Commission's awards, it seems clear that no individual or class property right attaches or vests in the Commission's award as entered, such rights depending on later congressional determination.

Finally, we must determine the proper disposition to make in view of our conclusions concerning the validity of the distribution statutes. Of course, since the Act distributing the award redressing the 1818 wrong is being upheld, the interlocutory restraint affecting the remaining portion of that award should be vacated, and we will grant a declaratory judgment of the validity of 25 USCA §§ 1181-86 and deny all other relief sought in connection with the award in Docket No. 337 which that statute distributes.

We have concluded that the statute distributing the award redressing the 1854 wrong, 25 USCA §§ 1291-97,

contains irrational classifications, resulting in an invalid underinclusion. Jimenez v. Weinberger, 417 U.S. 628, 637. In such circumstances there are two general alternatives: the court may declare the statute invalid as a whole, or it may extend its coverage to include those aggrieved by the exclusion. See Welsh v. United States, 398 U.S. 333, 361 (Harlan, J. concurring); Moritz v. Commissioner of Internal Revenue, 469 F.2d 466, 470 (10th Cir.), cert. denied, 412 U.S. 906. While in some cases involving a deeply imbedded policy there are compelling reasons to make the "necessary statutory repairs," Welsh v. United States, *supra*, 398 U.S. at 366, extending the coverage of the statute and saving its validity, we feel that we may not do so here.

There is no separability clause in the statute. The absence of such a clause may not foreclose the exercise of discretion to the end that the legislative provisions may be repaired and saved. *Id.* at 366. Here the difficulty with repair is that the remainder of the statute does not contain general provisions easily adaptable to an extension of the statute's coverage. See Moritz v. Commissioner of Internal Revenue, *supra*, 469 F.2d at 470. Moreover, even if repairs by an extension of coverage were possible, we cannot confidently say that Congress would have intended the continued operation of the remaining parts of the statute—such as the provision for withholding 10 percent of the awards in trust—if it had known that the statute would have to be subjected to an extension of its distributive provisions to include the Kansas Delawares.

In view of these difficulties and the absence of a separability clause, we conclude we should follow the general presumption that is observed where a separability clause is not provided, and hold the statute invalid as a whole. See Carter v. Carter Coal Co., 298 U.S. 238, 312. This disposition will permit further congressional consideration of a desired distribution enactment as a whole, free of the invalid exclusion.

In sum, we conclude that we should adjudge the statute distributing the award redressing the 1818 wrong, 25 USCA §§ 1181-86, valid in all respects. The preliminary restraint against distribution of the remainder of that award will be vacated, and all relief sought by the plaintiffs with respect to that award will be denied. With respect to the statute distributing the award redressing the 1854 wrong, 25 USCA §§ 1291-97, we are entering our decree declaring that the provisions including the Cherokee Delawares and the Absentee Delawares in the distributive scheme are valid, but that the classifications drawn and the resulting exclusion of the Kansas Delawares render this distribution statute invalid as a whole, and we restrain distribution by the Secretary under that statute.

We find and conclude that there is a case of actual controversy within the jurisdiction of the court, appropriate for entry of a declaratory judgment determining the rights and legal relations of the parties and classes involved. The funds appropriated to satisfy the award in Indian Claims Commission Dockets Nos. 72 and 298, and the increments of interest thereon, are under the control of the Defendant Secretary and his agents and employees, and are required to be distributed and credited pursuant to the distribution statute which we hold invalid. Unless equitable relief is granted, such distribution and crediting will occur and irreparable harm to the plaintiffs and the plaintiff Kansas Delaware class will result. Therefore declaratory and equitable relief should be granted in connection with said award, as provided in our judgment.

Since our earlier orders were entered denying motions, and the filing of answers to the complaints, several additional motions have been filed by the parties for additional relief. We conclude that these motions should all be denied for lack of merit or because our conclusions and our decree render all necessary and proper relief.

s/ William J. Holloway, Jr.
WILLIAM J. HOLLOWAY, JR.
United States Circuit Judge

s/ Luther B. Eubanks
LUTHER B. EUBANKS
United States District Judge

APPENDIX

A

In the transcript of the hearing before the Subcommittee on Indian Affairs of the House Committee on Interior and Insular Affairs, the following remarks appear between Mr. Pruner, a member of the Tribal Council for the Absentee Delaware Tribe; Congressman Edmondson of the Subcommittee, who presided; and Mr. Townsend of the Delaware Business Committee for the Cherokee Delawares, (House Subcomm. Hearings *supra* n. 27, at 78-80):

> Mr. Pruner. To clarify that one point further, Myrtle Holder and Exendine are members of our tribe—
>
> Mr. Edmondson. They did not sue in that capacity, they sued in the capacity as class litigants for the Delaware Nation.
>
> Mr. Pruner. Yes.
>
> Mr. Edmondson. I can understand Counsel's reason for having drafted it that way, because he wanted a provision that would cover the waterfront. And he got it covered with the judgment. *Of course we have the task of defining just who the Delaware Nation in 1854 included, in addition to what you have before us here today as Plaintiffs representing the two Oklahoma groups.* And I for one am certainly ready and willing to exclude anybody who is a member of the Delaware

Nation of 1854 who went elsewhere and participated in a judgment as a member of another tribe. *But I have some difficulty about a person who is a descendant of that Delaware Nation of 1854 who went elsewhere and has not affiliated with another tribe and participated in a judgment from another tribe.* It poses a problem for me as a very biased Oklahoman on the subject. And I think you will probably have more trouble with non-Oklahomans than you do with Oklahomans.

Mr. Rochmes. *Mr. Chairman, we do not think there are any such. We know the Bureau maintains there are. We think that all those people either are on those rolls or are eligible for the rolls at the very times at which the rolls were made.*

Mr. Edmondson. If you do not think there are any you would have no objection to our including as an eligible person who can prove he is a lineal descendant of someone who was a member of the Delaware Nation in 1854, and who had not participated in any other tribal judgment?

Mr. Rochmes. I think you would have to draft tougher standards than that, because the Bureau people have already made it known to us that they intend to include people who we think clearly are not Delawares and were not part of the Delaware Nation as of that time.

Mr. Edmondson. Then they would have to prove that they are descendants of Delawares.

Mr. Rochmes. Yes. But the Bureau is already saved [sic] with the proof, as for example, that the Christian Munsees were Delawares as of this time. And we think the evidence which saves [sic] them would not save [sic] a court and would not save [sic] you, perhaps. (emphasis added)

B

Defendants point to several statements in the legislative history which they rely on as showing that Congress was aware that it might be eliminating some lineal descendants of the 1854 Delaware Nation in enacting the narrower provisions of 25 USCA § 1292. The first is contained in the Statement of Louis L. Rochmes, tribal attorney for the Cherokee Delawares group, (attached to the House Subcomm. Hearings, *supra* n. 27 at 45 ff).

That Statement reads, in part, as follows:

> This statement is submitted in support of the [Cherokee and Absentee Delaware] tribes' position on H.R. 5200.
>
> In substance that position is that the bill should provide for the division of the funds between the two tribes, to the exclusion of non-Delawares.
>
> Discretion to effect another division has been requested by the Bureau of Indian Affairs . . . The Bureau proposes to conduct a search among the Stockbridge-Munsee Community of Wisconsin for those descendants of the "Emigrant New York Indians" who, it is asserted, "were Delawares who had previously absented themselves from the main body of the tribe" *and also to search for others who, it is hypothesized, "may also be descendants of members of the Delaware Nation in 1854."* These are suppositions not based on fact. I was associated with counsel for the plaintiffs in the Emigrant New York Indian case, and am familiar with the evidence adduced in that case. . . . There was no evidence of Delawares among the Emigrant New York Indians. . . .
>
> Even if these suppositions were based on fact, they would not justify the Bureau's position. The Indian Claims Commission Act is intended expressly for the benefit of existing Indian tribes, bands and other iden-

tifiable groups, and a search for individual descendants who may have elected to change their tribal affiliation is unwarranted. . . .

* * *

The Delaware tribes are particularly concerned with an opinion expressed by Bureau representatives. . . . This is the opinion that a group of Munsee Indians living in Kansas, sometimes known as the Christian Indians, sometimes as the Christian Munsees, and more recently as the Chippewa Munsees, are entitled to be regarded as Delaware for the purpose of sharing in Delaware judgment funds, and particularly in Dockets 72 and 298. (emphasis added)

Defendants point to the mention of "others" who may also be descendants of members of the Delaware Nation in 1854. However, Mr. Rochmes states thereafter that the supposition that there are any "other" such descendants "is not based on fact." The statement as a whole focuses on the question of the possible inclusion of various Munsee Indians in Dockets Nos. 72 and 298, while making no reference to the Kansas Delawares or any group of lineal descendants of true members of the Delaware Nation in 1854 who might be excluded from the judgment by deletion of the "lineal descendants" provision. Mr. Rochmes' testified later before the House Subcommittee on Indian Affairs, to which this statement was made, that all true descendants of the Delaware Nation of 1854 who had not affiliated with another tribe or participated in a judgment to another tribe would be covered by the distribution provision proposed by the Cherokee and Absentee Delawares. See Part A of this Appendix.

A second statement to which defendants refer is contained in a letter from Nathaniel P. Reed, Assistant Secretary of the Interior, to Caspar W. Weinberger, Director, Office of Management and Budget, dated September 28,

1972, which states the views of the Department of the Interior on H.R. 14267. That letter discusses the differences between H.R. 14267 and H.R. 5200 and, in regard to H.R. 14267's reliance solely upon the 1906 and 1940 rolls, states: "Although, unfortunately, they [the two rolls] do not include a few Delaware descendants who do not reside in Oklahoma, we consider them to be acceptable rolls." We note however, that this letter was written after H.R. 14267 had passed both houses of Congress to give the Department of the Interior's recommendation as to whether the President should approve the bill.

Third, defendants point to a report written by the Department of the Interior which was included in the House Report accompanying H.R. 16402 (the bill for distribution of the award in Docket No. 337), wherein the Department stated (H.R. Rep. No. 1555, 92d Cong., 2d Sess. 3-4 (1968) (Defendants Secretary and Cherokee Delawares' Ex. 3)):

> There are also other individuals who are lineal descendants of members of the Delaware Nation as it was constituted in 1818, but who was not presently affiliated with either of the Oklahoma Delaware groups. Some we believe, are affiliated with the Stockbridge-Munsee Community in Wisconsin and *others are not affiliated with any tribal group under federal supervision.* In view of the amalgamation of the Delawares with other Indians and the many unique and complex problems encountered in identifying the ultimate beneficiaries of this award, a brief history of the Delaware Nation is enclosed. (emphasis added)

We cannot agree that this earlier, 1968 Departmental reference to "others" (i.e., other lineal descendants not affiliated with any tribal group) served as any notice to Congress of the existence of the Kansas Delawares, especially in view of the fact that the history the Department attached to its report dealt extensively with Munsee affiliations.

In its history the Department stated (*Id.* at 10):

> The *majority* of Delaware Indians who moved on to the Kansas reserve remained until 1867. By the terms of an April 8, 1867, agreement concluded between these Delawares in Kansas and the Cherokee in Oklahoma, the Delaware removed to Indian territory and reside today as Cherokee Delaware in northeastern Oklahoma. (emphasis added)

From this and other exhibits defendants request a finding that:

> Congress was aware, from 1968 forward, that the appropriation and distribution legislation which it enacted to pay the Final Awards of the Indian Claims Commission in *both* Indian Claims Commission Docket No. 337 and Indian Claims Commission Docket No. 72 and 298, would not provide payment to every person who could claim to be, ethnologically, a 'Delaware'. The Department of Interior's Report to Congress, a part of the legislative history of House Report No. 1555, 90th Congress, 2d Sess., the Report which accompanied H.R. 16402, the Bill which eventually became Public Law 90-508 (25 U.S.C. 1181-86) (Sec. Of Int. and D.T.I. No 3) reflects that the Bill would provide for payment to the 'majority' of modern-day Delaware Indians.

Defendants' Proposed Findings of Fact and Conclusions of Law, p. 63 (as amended Oct. 3, 1975).

We are not persuaded that the 1968 or 1972 legislative history, or both combined, support such an inference or indicate any awareness that the 1972 statute (25 USCA §§ 1291-97) would exclude a group such as the Kansas Delawares who were lineal descendants of the 1854 Delaware tribe.

Defendants also cite the House Committee Report accompanying H.R. 14267, (the bill for distribution of the

award in Dockets Nos. 72 and 298) and emphasize the statement therein that (H.R. Rep. No. 92-1081, 92d Cong., 2d Sess. 2 (1972) (Defendants Secretary and Cherokee Delawares' Ex. 6)):

> The recommendations of the Department [of the Interior] regarding the preparation of the updated roll [of those who had participated in the Docket No. 337 judgment] were not adopted by the committee because they were strenuously opposed by both of the Indian groups concerned, and *the Indian position is, in the opinion of the committee, a defensible one.* (emphasis added)

However, as stated above, it does not appear that the House Committee was aware that the "Indian position" it termed defensible would result in the exclusion of lineal descendants of persons who were members of the Delaware Tribe in Kansas in 1854.

Finally, defendants have pointed to the following colloquy between Senator Bellmon and Mr. John O. Crow, then Acting Commissioner of the Bureau of Indian Affairs, which occurred during the course of the Senate subcommittee hearings on distribution legislation for the award in Dockets Nos. 72 and 298, at which Senator Bellmon presided:

> Senator Bellmon. As you know, I am from Oklahoma and I am aware that both Delaware groups oppose S. 1067, but favor H.R. 14267, which was approved by the House. Can you give me your reasoning for favoring S. 1067 or H.R. 14267?
>
> * * *
>
> Senator Bellmon. Do you know the basis for the objections to S. 1067?
>
> Mr. Crow, I think the tribal delegates can tell you much better than I. However, I think that the primary

difference, perhaps, is in the definition of persons excluded from sharing in the judgment.

Senator Bellmon. Do you have any information as to how many would be excluded under H.R. 14267 that would have been included in S. 1067?

Mr. Crow. *It is most difficult to say. We think the number would be quite small. We can't see any possibility of it being more than 200 people.*[50]

Hearings on S. 3113, S. 1067, S. 2249 and S. 2298 Before the Subcomm. on Indian Affairs of the Senate Comm. on Interior and Insular Affairs, 92d Cong., 2d Sess. 38-39 (July 21, 1972) (Pl. Ex. 5). Defendants assert that this colloquy demonstrates that both the Senate and the House were aware that the distribution statute would not include all possible Delaware claimants.

We note Senator Bellmon's question to Mr. Crow further in the same hearing. *Id.* at 40.

Senator Bellmon. If the Congress were to take action which excluded the *non-Oklahoma Delawares* from sharing in this judgment, do you see any possible future legal implications for the federal government? (emphasis added)

Mr. Crow. Mr. Chairman, I don't.

Subsequent testimony by tribal delegates in the same hearing makes it clear that the impression was that the persons that would have been included by S. 1067 (to which Mr. Crow made reference, *supra*) and the "non-Oklahoma Delawares" that were being considered for exclusion (to which Senator Bellmon made reference, *supra*) were the Munsee Indians.

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[50]It will be recalled that S. 1067 would have updated the Docket No. 337 roll to include lineal descendants of the Delaware Nation as it existed in 1854. H.R. 14267 was essentially the bill enacted.

Mr. Townsend. Mr. Chairman, I am Bruce Miller Townsend, Chairman of the Delaware Tribal Business Committee. To my right is Mr. Lawrence Snake who is President of the Absentee Delaware Tribe of Western Oklahoma. . . .

* * *

When S. 1067 was first introduced into the Senate of the United States, there were problems at that time that were latent and did not come to the fore until a later time. They didn't take very long. *Id.* at 42.

* * *

The crux of the matter is the difference between the departmental report, as Mr. Crow has stated, his inclusion of a foreign group of Indians in Delaware matters, that is the Munsee Tribe, and the various names by which it goes. *Id.* at 44.

* * *

Senator Bellmon. . . .

Only one further question. This is the tough one, I am sure, for all of you. But if Congress moves ahead to approve legislation along the lines of the House-passed bill, which would exclude *the non-Oklahoma Delawares, the Munsees*, from sharing in its present judgment, do you foresee any future legal implications for the federal government? (emphasis added)

Mr. Townsend. Mr. Chairman, I am an attorney at law and I don't know that this gives me any greater insight than anybody who is not an attorney, but my way of knowledge—if there has been any legal problem that could face the Bureau of Indian Affairs, it would be a puppy that they brought home and has grown into a ferocious beast by now.

I say this by reason of the fact that any problems that could be brought out in the way of litigation has been fostered, promulgated, by the unilateral action of

the Bureau. I can see none, but there have been these 1,552 applications filed. The Bureau beat the bushes to get them filed and, as far as whether or not any of those people would be interested in instituting litigation, I would say that based upon their track record the chances are nil.

I say that because of the fact that they did not respond to my brief in 1966. They did not respond any further than discussing the matter with their counsel subsequent to that time. No one was present at the House of Representatives Subcommittee on Indian Affairs hearing in 1968. No member of the Munsee Tribe was present at the House Subcommittee hearing last November which was passed over into this March. No members of the Munsee Tribe, nor did they have representatives at those meetings or the March meeting before the House.

Of course, anyone can go to a lawyer, draw up a paper and call it a lawsuit, but I don't think this is what your question implies. I don't foresee the possibility of a meritorious lawsuit in this matter.

Senator Bellmon. Mr. Snake.

Mr. Snake. Mr. Chairman, I am of the same opinion. Since all of these claims have been in hearing, we have never to this date had any Munsee to testify. So I am of the same opinion that there would not be any lawsuit. *Id.* at 69-71.

C

Article IX of the 1866 Treaty (14 Stat. 793, 796) provides:

Article IX. It is also stipulated that the Secretary of the Interior shall cause a registry to be made of the names of all of said Delawares who have elected to dissolve their tribal relations and to become citizens

of the United States, as provided in this treaty, with the names, ages, and sex of the members of the family of each of said Delawares, and present a certified copy of the same to the judge of the district court of the United States for the district of Kansas, and cause a copy to be filed in the office of the commissioner of Indian affairs, after which any of said Delawares, being adults, may appear before the said judge in open court, and make the same proof and take the same oath of allegiance as is provided by law for the naturalization of aliens, and also make proof to the satisfaction of said court, that he is sufficiently intelligent and prudent to control his own affairs and interests, that he has adopted the habits of civilized life, and has been able to support, for at least five years, himself and family; when he shall receive a certificate of the same under the seal of the said court; and on the filing of the said certificate in the office of the commissioner of Indian affairs, the said Delaware Indian shall be constituted a citizen of the United States, and be entitled to receive a patent in fee simple, with power of alienation, for the land heretofore allotted to him, and his just proportion, in cash or in bonds, of the cash value of the credits of said tribe, principal and interest, then held in trust by the United States; and also, as the same may be received, his proportion of the proceeds of the sale of lands under the provisions of this treaty, when he shall cease to be a member of said tribe. Whereupon all of the minor children of those who have become citizens shall be construed to have elected to sever their connection with said tribe for the time being, and be entitled to their just proportion of the annuities of the tribe, to be paid to the head of the family to be expended for their support and education until they shall attain the age of twenty-one years, after which each shall elect to remove to his tribe or to become a citizen of the United States, as hereinbefore

provided, and if thus admitted to citizenship, shall be entitled to all the privileges and interests herein provided for the head of the family. Should any minor as aforesaid, arriving at the age of twenty-one years, and electing to become a citizen of the United States, or any adult Indian having so elected, fail to be admitted, he shall not be compelled to remove, but the Secretary of the Interior shall provide proper guardianship for the protection of his rights and interests and those of his family. There shall be granted to each of the Delawares who have thus become citizens, a patent in fee simple for the lands heretofore allotted to them, and, if they do not remove with the nation, their pro rata share of all annuities and trust property held by the United States for them, the division to be made under the direction of the President of the United States, after which such persons shall cease to be members of the Delaware tribe, and shall not further participate in their councils, nor share in their property or annuities.

The Act of 1874 (18 Stat. 146, 175) appropriated an amount for payment of interest on the Delaware general fund, then added:

For this amount, to enable the Secretary of the Interior to pay to the children of the Delaware Indians who became citizens of the United States under the provisions of the ninth article of the Delaware treaty of July fourth, eighteen hundred and sixty-six, and the children of Betsey Zeigler, who died before completing her citizenship under the provisions of said article, their proportionate share of the money and stocks held in trust by the United States for the Delaware tribe of Indians, fifty-four thousand five hundred and fourteen dollars and twenty-three cents, of which twenty-one thousand four hundred and forty-eight dollars and seven cents shall be deducted from the

money-credits of said tribe, and thirty-three thousand and sixty-six dollars and sixteen cents, to be taken equitably from their several kinds of stock, shall be transferred to the Secretary of the Treasury and become the property of the United States: Provided, That if the Secretary of the Interior shall so determine, the whole amount hereby appropriated shall be taken from the money-credits of the tribe, the Secretary of the Interior to designate the funds from which said amounts shall be taken: Provided, That in the case of deceased persons, the Secretary of the Interior shall make payment to their legal representatives; and said Delaware children are hereby declared to be citizens of the United States, with all the rights, privileges, and immunities of such; and the Secretary of the Interior is hereby authorized and directed to cause patents to issue in fee-simple to said persons for the lands allotted to them; and in case of the decease of any of said persons, the said patents shall issue in the names of such deceased persons, including the said Betsey Zeigler, and the title to the lands designated in such patents shall inure to and become vested in the heirs, devisees, or assignees of said deceased patentees, as if the patent had issued to the deceased person during life; and the Secretary of the Interior shall cause patents to be issued in fee-simple in the names of Barbara Zeigler, Martha Zeigler, Samuel Ketchum, Nathan S. Tiblow, and Francis H. Grinter, who belonged to the families of the citizen class, and who died prior to the census of said Indians made by the agent under the provisions of the treaty of July fourth, eighteen hundred and sixty-six, for the lands allotted to them; and the lands designated in such patent shall enure to and become vested in the heirs, devisees, or assignees of said deceased patentees, as if the patent had issued to the deceased person during life.

[APPENDIX]

DAUGHERTY, District Judge concurring part and dissenting in part:

I concur in part and dissent in part. I concur in that part of the majority opinion which results in upholding the distribution of funds ordered by the Congress in 25 U.S.C. §1181-6 and rejecting Plaintiffs' attacks thereon. However, I must dissent to that part of the majority opinion which declares the distribution of funds ordered by the Congress in 25 U.S.C. §1291-7 to be void and unconstitutional.

PLENARY POWER OF CONGRESS

I consider such distribution of funds to the Indian Tribes and members on their rolls as ordered by Congress in 25 U.S.C. §1291-7 to be within the plenary power of Congress in relation to Indians and not justiciable. In *Lone Wolf* v. *Hitchcock*, 187 U.S. 550, 49 L. Ed. 299, 23 S.Ct. 216 (1903) it was held:

> "Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government."

This case has not been reversed and the decisions following it are too numerous to cite. However, as late as 1973 our Court of Appeals in *National Indian Youth Counc., Int. Ind. Sch. Chap.* v. *Bruce*, 485 F. 2d 97 (Tenth Cir. 1973) held:

> "District courts are also without jurisdiction when confronted with non-justiciable political questions, such as determining the status of Indian tribes. Baker v. Carr, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962). Congress has exclusive plenary legislative authority over Indians and all of their tribal relations. Lone Wolf v. Hitchcock, 187 U.S. 553, 23 S.Ct. 216, 47 L.Ed. 299 (1903). This court has recognized the plenary

power of Congress to control and manage the affairs of its Indian wards. Wolfe v. Phillips, 172 F.2d 481 (10th Cir. 1949), cert. denied 336 U.S. 968, 69 S.Ct. 941, 93 L.Ed. 1119 (1949); Taylor v. Tayrien, 51 F.2d 884 (10th Cir. 1931)."

Also see *Groundhog* v. *Keeler*, 442 F. 2d 674 (Tenth Cir. 1971).

Congress did not have to create the Indian Claims Commission, 25 U.S.C. §§70 et seq., to allow Indians to present claims for redress for past Government wrongs. Nor was Congress required to appropriate and distribute funds regarding a final award recommended by the Commission. Congress by provisions in the Indian Claims Commission Act reserved unto itself the matter of determining the distribution to be made of appropriated funds in payment of awards recommended by the Commission. All of this is pursuant to the unique plenary authority of Congress over Indians. It is therefore my belief that the attacks made herein on the distribution of funds to Indians as ordered by the Acts of Congress involved herein are non-justiciable. I have not found a single case in which an Act of Congress relating to the affairs of Indians has been stricken down as being unconstitutional and void as the majority does herein.

TREATY PROVISIONS

In addition, the Treaty itself, which is the foundation of Plaintiffs' alleged rights, gives full authority and discretion to Congress in the matter of the distribution of funds derived from the land sales when it provides in Article 8 in part as follows:

> " * * * and *in distributing the funds to the (Delaware) people*, due regard and encouragement shall be given to that portion of the Delawares who are competent to manage their own affairs, * * * but *Congress*

may, at any time, and from time to time, by law, make such rules and regulations in relation to the funds arising from the sale of said lands, and the application thereof for the benefit and improvement of the Delaware people, as may in the wisdom of that body, seem *just and proper.*" (Emphasis added)

Thus, Congress had treaty authority with the Delaware Nation (as well as plenary power) to use its wisdom in the distribution of the funds involved herein to the Delaware people.

APPROPRIATED FUNDS

Furthermore, I am unable to discard the proposition urged by the Defendants that the Acts of Congress under attack are appropriations of public funds within the meaning of Article 1, Section 9, Clause 7, United States Constitution, and as such may not be redesignated by the Courts under the pronouncement of *United States* v. *Price*, 116 U.S. 43, 29 L.Ed. 541, 6 S.Ct. 235 (1885). This early case and those following it teach that no discretion is vested in the Secretary of the Treasury "or in any Court" to determine the correctness of either the amount or the designee of a payment ordered by an Act of Congress. Congress by 25 U.S.C. §70u reserved unto itself exclusive power to distribute, or to decline to distribute, the appropriated funds necessary to pay any final award recommended by the Indian Claims Commission. The majority opinion has the effect of ordering a redesignation of the recipients of appropriated funds from those designated by the Congress.

RATIONALITY

Also, there is the matter of whether there is rationality in the Acts passed by Congress which the majority strikes down. Ordinarily, determination and classification laws are upheld if there is a rational basis for the same. *United States* v. *DePugh*, 266 F. Supp. 453 (W.D. Mo. 1967), affm'd.

393 F.2d 367 (Eighth Cir. 1968, cert. den. 393 U.S. 832.[1] At one point in this litigation I agreed (without abandoning my position regarding the plenary power of Congress, the provisions of the Treaty involved granting Congress full power regarding the distribution of funds pertaining to the sale of the Indian lands and that the funds here distributed by Congress are an appropriation of public funds) to hear evidence and arguments and receive Briefs on the rationality question. As I read the majority opinion it turns on an alleged lack of rationality or lack of a rational basis for the Congress to exclude the so-called Kansas Delawares from the distribution of funds ordered by 25 U.S.C. §1291-7. I find in the record an abundance of rationality to support the distribution of funds made by Congress in these Acts and do so differently than in 25 U.S.C. §1181-6.

The Indian Claims Commission is without authority to fix the distribution to be made of their recommended awards. See 25 U.S.C. 70r as to the contents of the final determination of the Commission. "How the award is to be paid and precisely who can participate * * * * * are questions for Congressional and administrative determination." *Snoqualmie Tribe of Indians* v. *United States*, 178 Ct.Cl. 570, 372 F. 2d 951 at page 957 (1967); *Peoria Tribe of Okla-*

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[1]This case provides:

"This Court is governed by the fundamental rule of statutory construction that a presumption of validity attaches to an Act of Congress, and that such presumption is not lightly overcome. See, United States v. National Dairy Corp., 372 U.S. 29, 32. 83 S.Ct. 594, 9 L.Ed. 561 (1963) rehearing denied 372 U.S. 961, 83 S.Ct. 1011, 10 L.Ed. 2d 13; McMahon v. City of Dubuque, Iowa, 255 F.2d 154, 160 (8th Cir. 1958) cert. den. 358 U.S. 833, 79 S.Ct. 53, 3 L.Ed. 2d 70. So long as a rationally sound basis exists for the congressional determination or classification, that determination is within the constitutional power of Congress. Egan v. United States, 137 F.2d 369, 375 (8th Cir. 1943), cert. den. 320 U.S. 788, 64 S.Ct. 195, 88 L.Ed. 474; Stutz v. Bureau of Narcotics, etc., 56 F. Supp. 810, 813 (N.D. Calif. 1944). It is a matter of legislative judgment. See, Kentucky Whip and Collar Co. v. Illinois Central Railroad Co., 299 U.S. 334, 57 S.Ct. 277, 81 L.Ed. 270 (1937)."

homa v. *United States*, 169 Ct.Cl. 1009 at page 1011-12 (1965). But the fact is that the Commission nevertheless recommended or at least suggested to whom their recommended awards in both CD 337 and CD 72 and CD 298 should be distributed. In CD 337 the Commission announced the idea of a distribution to individuals who could establish requisite Delaware blood entitlement and did so notwithstanding the obvious fact that the lands involved were tribal lands and not individual lands.[2] Congress adopted or followed this suggested distribution in its appropriation and distribution enactments and such problems, turmoil, confusion and delay ensued that these funds have not yet been fully distributed! In CD 72 and 298 the Commission recommended or suggested (and again the Congress followed the same) that the funds be distributed to the two recognized Tribes of Delaware Indians and members on their rolls which is what the Commission should have recommended or suggested and the Congress should have done in CD 337. It is believed fair to conclude that this change in attitude about distribution in both the Commission and the Congress came from the problems which resulted from the earlier distribution and the realization that it was wrong. This is a rational basis for the decision of the Congress exercised in enacting 25 U.S.C. §1291-7. But there is more rationality.

The so-called Kansas Delawares on the one hand and the Cherokee (or Oklahoma) Delawares and the Absentee Delawares on the other hand over a hundred years ago came to a parting of the ways. The Delaware Indian Nation ceded their lands in Kansas, moved to Oklahoma from Kansas, affiliated with the Cherokee Nation in Oklahoma and the Caddo-Wichita Indian Tribe in Oklahoma, its individuals maintained Indian citizenship, and they have main-

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[2]Public lands and public funds of Indian Tribes are tribal properties and are not held in individual ownership. *Minnesota-Chippewa Tribe* v. *United States*, 161 Ct. Cl. 258, 315 F.2d 906 (1963).

tained tribal recognition and organization for over 100 years. On forty-one (41) occasions since removal to Oklahoma Congress has recognized these Oklahoma Delaware Tribes in legislative measures. The so-called Kansas Delawares stayed in Kansas, individually took an allotment of tribal land in Kansas in fee with power of alienation, individually took their proportionate share of trust funds held by the Delaware Tribe, took United States citizenship, renounced Delaware citizenship, obtained provisions allowing their minor children to take United States citizenship (which eventually occurred) and fully divorced themselves from the Delaware Tribe which left Kansas for parts in Oklahoma. This most significant turn of events affords a rational basis for the Congress to distribute the award recommended by the Commission regarding tribal lands to these recognized Delaware Tribes and to those on the rolls of these recognized Delaware Tribes, took land in Kansas, their share of tribal funds and became United States citizens. In *Miami Tribe of Oklahoma* v. *United States*, 281 F. 2d 202 (Ct. Cm. 1960) it is held:

> "The Indian Claims Commission found that the Indiana Miami who had remained in or who returned to Indiana without tribal consent had separated themselves from the tribe, severed their tribal relationship, and lost all right to participate in the tribal assets, funds or property. This conclusion is correct. Eastern Band of Cherokee Indians v. United States, 117 U.S. 288, 309-312, 6 S.Ct. 718, 29 L.Ed. 880; Prairie Band of Potawatomi Indians v. United States, Appeal No. 2-57, decided July 16, 1958, 165 F. Supp. 139, 143 Ct. Cl.—(slip opinion, pp. 12 and 20)."

And it seems to me that the majority overlooks another significant distinction which is present with reference to the distribution made by Congress in 25 U.S.C. §1181-6 (which the majority upholds) and the distribution made by Congress in 25 U.S.C. §1291-7 (which the majority de-

clares to be unconstitutional and void as possessing no rational basis) which provides rationality for the later distribution being different from the earlier distribution. The distribution made in 25 U.S.C. §1181-6 pertained to the sale of Delaware lands in Indiana. The distribution made in 25 U.S.C. §1291-7 pertained to the sale of Delaware lands in Kansas. After ceding the lands in Indiana the Delawares moved to Missouri and thence to Kansas. None stayed in Indiana, none took an allotment of land in Indiana in fee, none took their proportionate share of tribal funds and none took United States citizenship. The Delawares in Kansas maintained tribal identity. Whereas, when the Kansas lands were ceded a vastly different turn of events ensued as above pointed out and which will not be repeated. This significant difference provides rationality for the distribution made in 25 U.S.C. §1291-7 as distinguished from that made in the earlier distribution.

Also there was legal precedent for the distribution made by Congress in the distribution ordered in CD 72 and 298. When an award became payable to the Delaware Tribe for a strip of land in Kansas known as the Delaware "outlet" it was paid to the Oklahoma Delawares (Delaware Tribe of Indians and Absentee Delaware Tribe of Oklahoma) to the exclusion of the so-called Kansas Delawares, the same as the distribution of Congress in 25 U.S.C. §1291-7. See *United States* v. *Delaware Tribe of Indians*, 427 F. 2d 1218 (Ct. Cm. 1970).

Another legal precedent for the distinction made by the Congress is the ruling in *Minnesota-Chippewa Tribe* v. *United States*, 161 Ct. Cm. 258, 315 F. 2d 906 (1963) which held that public lands and public funds of Indian tribes are tribal properties and are not held in individual ownership. The majority opinion acknowledges that the so-called Kansas Delawares do not have a vested interest in the fund. This is further rational for Congress to distribute the moneys derived from the sale of tribal lands to be paid

in part (10%) to the existing and recognized Tribes and the balance to those members on the rolls of existing and recognized Tribes to the exclusion of those not members of the Tribes nor on their rolls and who over a 100 years ago had taken individual allotments of tribal land in Kansas in fee simple, had taken their individual proportionate part of the existing tribal funds, left the Tribe, renounced Tribal membership and took United States citizenship.

How much rationale must Congress have in exercising its plenary legislative authority regarding Indian affairs? Assuming that some rationale must be present, which is doubted as to the exercise of the unique plenary power of Congress in Indian matters, there is in any event an abundance shown by the record. Congress had before it another Bill which would have distributed CD 72 and 298 funds in exactly the same manner as the wrongful and horrendous distribution made in CD 337. Congress rejected this Bill with full knowledge that there were some people claiming Delaware ancestry and entitlement to Delaware Tribal funds who would not be included within this distribution to the two recognized Delaware Tribes in Oklahoma and those on their membership rolls. Congress distributed appropriated funds by 25 U.S.C. §1291-7 with full knowledge that it was a different distribution from that made by 25 U.S.C. §1181-6. This was not a Congressional mistake. It was deliberate Congressional action and in the face thereof the majority would strike down 25 U.S.C. §1291-7 and advise Congress that it erred and must legislate again and in doing so must include the so-called Kansas Delawares but need not include the Munsee Delawares or the Christian Delawares or any other Delawares not belonging to the recognized Oklahoma Tribes. What will be the result if Congress declines to permit the Court to legislate for it regarding its plenary power in Indian affairs? It could be that Congress will decline to change its position for it acted rightly and within its authority or perhaps Congress will balk and refuse to distribute anything to anyone which

is also within its power under the Indian Claims Commission Act. It is my belief and position that if in fact Congress has made a plain and grievous error regarding the so-called Kansas Delawares in the passage of 25 U.S.C. §1291-7 (which I do not believe to be the case) upon petition and showing to the Congress by those aggrieved the Congress may correct the error and by virtue of its plenary power over Indian affairs the Congress is the only agency of the Government with power and authority to entertain Plaintiffs' complaint.

s/ Fred Daugherty
Fred Daugherty
United States District Judge

APPENDIX C

FILED
JAN 14 1976
REX B. HAWKS
CLERK, U. S. DISTRICT COURT
by VERA EDDLEMAN
DEPUTY

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

[Caption omitted in printing.]

ORDER

The court has for consideration an amended motion filed by the Absentee Delawares to modify or amend the judgment; a motion filed by plaintiff Weeks to alter or amend the judgment; and a motion filed by the Cherokee Delawares to modify or amend the judgment. On consideration of the motions and responses filed it is ordered as follows:

1. The Absentee Delawares' amended motion to modify or amend the judgment in essence seeks an amendment of the judgment to permit payment of attorneys' fees from funds referred to by 25 USCA §§ 1181-86, the statute which provides for distribution of the judgment funds in Indian Claims Commission Docket No. 337 to members of the Absentee Delaware Tribe of Western Oklahoma and others. The judgment entered December 18, 1975, vacated all restraint on distribution of funds pertaining to said Docket No. 337 and in no way bars payment of attorneys' fees from said funds. Furthermore, any such issues relating to attorneys' fees are not decided by the judgment and said judgment is amended, so far as needed, so as to be construed as not deciding such issues, and the judgment shall not be construed as disapproving or restraining any payment of attorneys' fees. If any judicial determination concerning attorneys' fees under said contract between the Absentee Delaware Tribe and its counsel (which contract is not presently before us) is proper, and necessary, then such issues are reserved and remitted to the single District Judges handling these cases. See Public Service Commission v. Brashear, 312 U.S. 621, 625, 629-30.

2. The motion of plaintiff Weeks to alter or amend the judgment in essence seeks modification of the judgment to reserve for determination, after the judgment becomes final, the question of attorneys' fees and costs to be awarded to her attorneys, or in the alternative a hearing and assessment thereof.[1] Plaintiff states she does not seek recovery of fees from opposing parties. The fees sought are those between "solicitor and client," with allocation to be made among members of the Kansas Delaware Class. See Sprague

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[1]Plaintiff says the motion is made to avoid the possibility of a construction of the judgment as barring such relief and the result in Kansas City Southern Ry. Co. v. Guardian Trust Co., 281 U.S. 1. The amendment and clarification made by this order do so and reserve and remit such issues to the single District Judges handling the cases.

v. Ticonic National Bank, 307 U.S. 161, 165. These issues concerning the Kansas Delawares should not be decided now and should await final determination of this controversy, including appeal. Id. at 168. Again, said judgment is amended, so far as needed, to be construed as not deciding but reserving such issues, which are remitted to the single District Judges handling the cases. See Public Service Commission v. Brashear, supra.

3. The motion filed by the Cherokee Delawares to alter or amend the judgment in essence seeks to amend the judgment to permit payment of attorneys' fees pursuant to a contract between the Delaware Tribe of Indians and its counsel, approved by the Secretary. This motion and the supporting brief do not specify which particular funds (those relating to Docket No. 337, or those relating to Dockets Nos. 72 and 298 of the Indian Claims Commission) should be used to make payment. Insofar as funds relating to Dockets Nos. 72 and 298 are concerned, the judgment restrains all distribution thereunder until a new distribution statute is enacted or amendment is made of 25 USCA §§ 1291-97. Insofar as the motion seeks modification for payment from such funds relating to Dockets Nos. 72 and 298, the motion must therefore be denied. With respect to funds relating to Docket No. 337, the judgment vacated all restraint on distribution of such funds and in no way bars payment of attorneys' fees from said funds relating to Docket No. 337. Again the issues relating to attorneys' fees are not decided by the judgment and said judgment is amended, so far as needed, to be construed as not deciding such issues, and the judgment shall not be construed as disapproving or restraining any payment of attorneys' fees. If any judicial determination concerning attorney's fees under said contract (which is not presently before us) is proper and necessary, then such issues are reserved and remitted to the single District Judge handling these cases. See Public Service Commission v. Brashear, supra.

4. The judgment is further amended to provide that its general denial of relief not granted does not dispose of possible awards of costs, and such claims as may be made for costs are likewise reserved and remitted to the single District Judges handling the cases.

IT IS SO ORDERED.

s/ William S. Holloway, Jr.
William J. Holloway, Jr.
United States Circuit Judge

s/ Fred Daugherty
Fred Daugherty, Chief Judge
Western District of Oklahoma

s/ Luther B. Eubanks
Luther B. Eubanks
United States District Judge

ENTERED IN JUDGMENT DOCKET ON JAN. 14, 1976

APPENDIX D

FILED
NOV 1 1974
REX B. HAWKS
CLERK, U. S. DISTRICT COURT
by .....
DEPUTY

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

[Caption omitted in printing.]

ORDER

Upon consideration of pending motions in these consolidated actions, and the arguments and briefs submitted thereon, it is ORDERED that:

The pending motion to dismiss filed by the defendant United States in No. Civ. 73-586-E, Western District of Oklahoma, entitled Weeks v. United States, et al, is sustained, the action as against the Government being an unconsented suit not within the jurisdiction of the court. Affiliated Ute Citizens v. United States, 406 U.S. 128, 141-42; United States v. Sherwood, 312 U.S. 584; see Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 687. The pending motions to dismiss in both of the above entitled actions filed by defendant Morton and all defendants other than the United States are denied.

The pending motion of plaintiff for summary judgment and the motion for partial summary judgment by defendant Delaware Tribal Business Committee and defendants other than the United States and defendant Morton, both pending in No. 73-586-E, Western District of Oklahoma, entitled Wanda June Weeks v. United States, et al, are overruled, it being the view of the Court that there may be genuine issues as to some material facts and that summary judgment procedures in said action are inappropriate.

The plaintiff Weeks in No. 73-586-E, Western District of Oklahoma has moved that said action proceed as a class action on behalf of the Kansas Delawares. In No. 73-C-311, Northern District of Oklahoma, now transferred to this district and consolidated with No. 73-586-E, the complaint requests that the action proceed also on behalf of the Kansas Delawares. In addition the motion of plaintiff Weeks in No. 73-586-E, requests that said action proceed against specified defendants as representatives of the Cherokee Delawares and the Absentee Delawares, respectively.

Pursuant to Rule 23(a), F.R.Civ.P., the court finds that the plaintiff class consisting of the Kansas Delawares, and the defendant classes consisting of the Cherokee Delawares and the Absentee Delawares are so numerous that joinder of all members thereof is impracticable; that there are questions of law or fact common to each class relating

to the rights of said class in regard to the claim of unconstitutionality under 25 U.S.C.A. § 1291 and related statutes; that the claims of the representative parties plaintiff and defendant are typical of the claims of their respective classes whose alleged rights are involved herein; and that the representative parties plaintiff and defendant will fairly and adequately protect the interests of the respective classes.

The court further finds that this action may proceed as a class action on behalf of the plaintiff class and against the defendant classes both pursuant to Rule 23(b)(1)(B) and Rule 23(b)(2), since adjudication with respect to the individual members of the classes would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; and since the defendant Morton and the several classes have acted on grounds generally applicable to said classes, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the classes as a whole. See Cranston v. Freeman, 290 F.Supp. 785 (N.D.N.Y.), rev'd on other grounds *sub nom.* Cranston v. Hardin, 428 F.2d 822 (2d Cir.), cert. denied, 401 U.S. 949; Rodriguez v. Swank, 318 F.Supp. 289, 293-295 (N.D. Ill), aff'd., 403 U.S. 901.

Pursuant to Rule 23(d), F.R.Civ.P., the court ORDERS that there be individual notice by certified mail to all members of the Kansas Delaware class who can be identified through reasonable effort, said notice to be mailed within 30 days hereafter, advising each member that these suits are being maintained as class actions for all Kansas Delawares and describing the nature of the suits; that the judgment, whether favorable or not to him or her, will be binding on all members of said Kansas Delaware class; and that any member may, if he or she desires, enter his or her separate appearance, on his or her own behalf or through counsel, within 45 days after the date of this order.

The court having granted the motions for class actions on behalf of the plaintiff Kansas Delawares in both of the above entitled cases, it is directed that the plaintiffs, by counsel, in both actions confer promptly with a view to agreement upon arrangements and procedures for notice and all other matters necessary for maintenance of these suits as class actions for the plaintiff Kansas Delawares. If there be any dispute concerning the same, the parties are directed to apply to the Honorable Fred Daugherty, Chief Judge of this district, for any necessary orders prescribing responsibilities as between the parties and counsel in connection with class action procedures. Such application to the Chief Judge should be made within 15 days from the date hereof.

As to the defendant classes of the Cherokee Delawares and the Absentee Delawares, in its discretion under 23(d), F.R.Civ.P., the court determines that personal notice to all members of said defendant classes is not necessary. Unlike the Kansas Delawares who have not had designated representatives and regular communications from them, it appears that the Cherokee Delawares and the Absentee Delawares have been represented by the parties named as defendants in No. 73-586-E, entitled Weeks v. United States, et al. It is, therefore, ORDERED that notice to the defendant classes, the Cherokee Delawares and the Absentee Delawares, be given within 30 days hereof by publication in a tribal business letter or paper, or in a newspaper of general circulation in the city or town designated by the defendant representatives of said classes as having the most circulation to the members thereof. Said notice shall contain the same notifications and provisions for optional separate appearances, by such persons themselves or through counsel, as are provided hereinabove in the notice to members of the Kansas Delaware class.

It is directed that the plaintiffs by counsel, and the defendant representatives of the Cherokee Delawares and

the Absentee Delawares, by counsel, also confer promptly with a view to agreement on an arrangement of procedures for such notice. If there be any dispute concerning the same, the parties are directed to apply to the Honorable Fred Daugherty, Chief Judge of this district, for any necessary orders. Such application should be made within 15 days from the date hereof.

The court, having disposed of pending motions and applications preliminary to a final hearing on the merits, advises the parties that at an early date after completion of said notices and expiration of the time for additional appearances, the court will hold a hearing on the merits of these actions on all disputed issues of fact, including the constitutional issue as to whether there is a rational basis under constitutional standards for the provisions of 25 U.S.C.A. § 1291 and the statutes related thereto, excluding the Kansas Delawares from participation in the distribution of the judgment funds in dispute in these cases, on which issue, among others, the court will receive all competent proof for final determination on the merits, and final arguments on the merits.

DATED THIS 1st DAY OF NOVEMBER, 1974.

s/ William J. Holloway, Jr.
WILLIAM J. HOLLOWAY, JR.
United States Circuit Judge

s/ Fred Daugherty
FRED DAUGHERTY
Chief Judge, Western District of Oklahoma

s/ Luther B. Eubanks
LUTHER B. EUBANKS
United States District Judge

APPENDIX E

FILED
NOV 4 1974
REX B. HAWKS
CLERK, U. S. DISTRICT COURT
by JUDITH E. MORGAN
DEPUTY

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

[Caption omitted in printing.]

AMENDMENT TO ORDER

On its own motion the court hereby amends its order entered November 1, 1974, in these consolidated actions to provide further as follows:

It is further ORDERED that the cost of notice by certified mail to the plaintiff class of the Kansas Delawares and the cost of notice by publication to the defendant Cherokee Delaware class and the defendant Absentee Delaware class shall be borne by the plaintiff. Cf. Eisen v. Carlisle & Jacquelin, 42 U.S.L.W. 4804. Prior to such notice by certified mail and publication, the proposed form of such notice and the proposed manner of publication shall be submitted to the Honorable Fred Daugherty, Chief Judge of the Western District of Oklahoma, for approval after service of a copy thereof on opposing counsel, together with notice stating when the same shall be presented to Chief Judge Daugherty.

DATED this 4th day of November, 1974.

s/ William J. Holloway, Jr.
WILLIAM J. HOLLOWAY, JR.
United States Circuit Judge

s/ Fred Daugherty
FRED DAUGHERTY
Chief Judge, Western District
Of Oklahoma

s/ Luther B. Eubanks
LUTHER B. EUBANKS
United States District Judge

APPENDIX F

FILED
2:30 PM
JAN 16 1976
REX B. HAWKS
CLERK, U. S. DISTRICT COURT
by .....
DEPUTY

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

[Caption omitted in printing.]

NOTICE OF APPEAL

Wanda June Weeks, Dorothy Frazier and Ruth Rattler, each individually and on behalf of the Kansas Delaware class, hereby take appeal and give notice of appeal to the Supreme Court of the United States of America.

1. The judgment appealed from is the judgment entered in this cause by the United States District Court for the Western District of Oklahoma on December 18, 1975, particularly numerical paragraph 2 thereof and that portion of numerical paragraph 3 thereof which adjudges "that the provisions of Pub.L. 92-456, 86 Stat. 762, 25 U.S.C.A. §§1291-1297, are valid insofar as they provide for the inclusion of the Defendant Cherokee Delaware class and the

Defendant Absentee Delaware class in the distribution of the judgment funds appropriated to satisfy the awards entered in Indian Claims Commission Dockets Nos. 72 and 298. . ."

2. This appeal is taken pursuant to 28 U.S.C.A. §§1252, 1253 and 2101.

WANDA JUNE WEEKS

DOROTHY FRAZIER

RUTH RATTLER

Individually and on behalf of the Kansas Delaware class

BY: .....

Delmer L. Stagner

.....

Stephen P. Friot

Their Attorneys

APPENDIX G

25 U.S.C. 1181-1186

25 U.S.C. 1181:

The Secretary of the Interior shall prepare a roll of all persons who meet the following requirements for eligibility: (a) They were born on or prior to and living on September 21, 1968; (b) their name or the name of a lineal ancestor appears on the Delaware Indian per capita payroll approved by the Secretary on April 20, 1906, or (c) their name or the name of a lineal ancestor is on or is eligible to be on the constructed base census roll as of 1940 of the Absentee Delaware Tribe of Western Oklahoma, approved by the Secretary of the Interior, or (d) they are lineal

descendants of Delaware Indians who were members of the Delaware Nation of Indians as constituted at the time of the Treaty of October 3, 1818 (7 Stat. 188), and their name or the name of a lineal ancestor appears on any available census roll or any other records acceptable to the Secretary. No person shall be eligible to be enrolled under this section who is not a citizen of the United States. Applications for enrollment must be filed with the Area Director of the Bureau of Indian Affairs, Anadarko, Oklahoma, on forms prescribed for that purpose. All applications filed shall be reviewed and a judgment of the eligibility of each applicant will be made and recommendation given in writing to the respective area directors by a committee composed of representatives of the two Oklahoma Delaware groups prior to submission of names to the Secretary of the Interior for acceptance on the distribution roll. The determination of the Secretary regarding the utilization of available rolls or records and the eligibility for enrollment of an applicant shall be final.

25 U.S.C. 1182:

There shall be withdrawn from the funds on deposit in the Treasury of the United States to the credit of the Delaware Nation that were appropriated by the Act of October 7, 1964 (78 Stat. 1033), and the interest accrued thereon, using the interest fund first, $7,000, which shall be divided equally between the Cherokee Delawares and the Delaware Tribe of Indians of Western Oklahoma, and shall be available for claims expenses incurred by the duly authorized personnel of the two tribal groups, as set forth in their joint resolution numbered 4-68 adopted on September 9, 1967.

25 U.S.C. 1183:

After the deduction of attorney fees and expenses, litigation expenses, all costs incident to the provisions of sections 1181-1186 of this title, and to making the payments

authorized by sections 1181-1186 of this title, including the cost of roll preparation, which shall be paid by appropriate withdrawals from the judgment fund, the unexpended balance of the funds on deposit in the Treasury shall be distributed in equal shares to those persons whose names appear on the roll prepared in accordance with section 1181 of this title. No person shall be entitled to more than one per capita share of the funds.

25 U.S.C. 1184:

The Secretary shall distribute a share payable to a living enrollee directly to such enrollee. The Secretary shall distribute the per capita share of a deceased enrollee to his heirs or legatees upon proof of death and inheritance satisfactory to the Secretary whose findings upon such proof shall be final and conclusive. Sums payable to enrollees or their heirs or legatees who are less than twenty-one years of age or who are under a legal disability shall be paid in acordance with such procedures as the Secretary determines will best protect their interests.

25 U.S.C. 1185:

The funds distributed under the provisions of sections 1181-1186 of this title shall not be subject to Federal or State income tax.

25 U.S.C. 1186:

The Secretary of the Interior is authorized to prescribe rules and regulations to carry out the provisions of sections 1181-1186 of this title, including a deadline for filing enrollment applications.

APPENDIX H

25 U.S.C. 1291-1297

25 U.S.C. 1291:

The funds appropriated by the Act of December 26, 1969 (83 Stat. 447, 453), to pay a judgment in favor of the petitioners, the Delaware Tribe of Indians in docket 298, and the Absentee Delaware Tribe of Western Oklahoma, and others, in docket 72, together with any interest thereon, after payment of attorney fees, litigation expenses, and such expenses as may be necessary in effecting the provisions of sections 1291 to 1297 of this title, shall be distributed as provided in such sections.

25 U.S.C. 1292:

The Secretary of the Interior shall prepare a roll of all persons who meet the following requirements:

(a) they were born on or prior to and were living on October 3, 1972; and

(b) they are citizens of the United States; and

(c) (1) their name or the name of a lineal ancestor appears on the Delaware Indian per capita payroll approved by the Secretary on April 20, 1906, or

(2) their name or the name of a lineal ancestor is on or is eligible to be on the constructed base census roll as of 1940 of the Absentee Delaware Tribe of Western Oklahoma approved by the Secretary.

25 U.S.C. 1293:

All applications for enrollment must be filed either with the Area Director of the Bureau of Indian Affairs, Muskogee, Oklahoma, or with the Area Director of the Bureau of Indian Affairs, Anadarko, Oklahoma, on or before

the last day of the fourth full month following October 3, 1972, and no application shall be accepted thereafter. The Secretary of the Interior shall give a rejection notice within sixty days after receipt of an application if the applicant is ineligible for enrollment. An appeal from a rejected application must be filed with the Area Director not later than thirty days from receipt of the notice of rejection. The Secretary shall make a final determintaion on each appeal not later than sixty days from the date it is filed. Each application and each appeal filed with the Area Director shall be reviewed by a committee composed of representatives of the two Oklahoma Delaware groups prior to submission of the application or appeal to the Secretary, and the committee shall advise the Area Director in writing of its judgment regarding the eligibility of the applicant.

25 U.S.C. 1294:

(a) The Secretary of the Interior shall apportion to the Absentee Delaware Tribe of Western Oklahoma, as presently constituted, so much of the judgment fund and accrued interest as the ratio of the persons enrolled pursuant to section 1292(c) (2) of this title bears to the total number of persons enrolled pursuant to section 1292 of this title. The funds so apportioned to the Absentee Delaware Tribe of Western Oklahoma shall be placed to the credit of the tribe in the United States Treasury and shall be used in the following manner: 90 per centum of such funds shall be distributed in equal shares to each person enrolled pursuant to section 1292(c) (2) of this title, and 10 per centum shall remain to the credit of the tribe in the United States Treasury, and may be advanced, expended, invested, or reinvested for any purpose that is authorized by the tribal governing body and approved by the Secretary of the Interior.

(b) The funds not apportioned to the Absentee Delaware Tribe of Western Oklahoma shall be placed to the credit of the Delaware Tribe of Indians in the United States

Treasury and shall be used in the following manner: 90 per centum of such funds shall be distributed in equal shares to each person enrolled pursuant to section 1292(c) (1) of this title, and 10 per centum shall remain to the credit of the tribe in the United States Treasury and may be advanced, expended, invested, or reinvested for any purpose that is authorized by the tribal governing body: *Provided,* That the Secretary of the Interior shall not approve the use of the funds remaining to the credit of the tribe until the tribe has organized a legal entity which in the judgment of the Secretary adequately protects the interests of its members.

25 U.S.C. 1295:

Sums payable to living enrollees age eighteen or older or to heirs or legatees of deceased enrollees age eighteen or older shall be paid directly to such persons. Sums payable to enrollees or their heirs or legatees who are under age eighteen or who are under legal disability other than minority shall be paid in accordance with such procedures, including the establishment of trusts, as the Secretary of the Interior determines appropriate to protect the best interests of such persons.

25 U.S.C. 1296:

None of the funds distributed per capita under the provisions of sections 1291 to 1297 of this title shall be subject to Federal or State income taxes.

25 U.S.C. 1297:

The Secretary of the Interior is authorized to prescribe rules and regulations to carry out the provisions of sections 1291 to 1297 of this title.

CERTIFICATE OF SERVICE

I, Delmer L. Stagner, a member of the bar of the United States District Court for the Western District of Oklahoma and a member of the bar of the Supreme Court of the United States, hereby certify that I did, on this 15th day of March, 1976, serve three true and correct copies of the foregoing Jurisdictional Statement of Wanda June Weeks upon: Mr. B. J. Rothbaum, Jr., Tomerlin, High & Patton, 323 Fidelity Plaza, Oklahoma City, Oklahoma 73102, counsel of record for the Absentee Delaware Tribe of Western Oklahoma, the Absentee Delaware class and the named individual members thereof; Mr. John G. Ghostbear, 340 Court Arcade Building, Tulsa, Oklahoma 74103, counsel of record for the Appellants, Dorothy Frazier and Ruth Rattler; Mr. Givens L. Adams, Assistant U. S. Attorney, United States Courthouse and Federal Building, Oklahoma City, Oklahoma 73102, counsel of record for Appellee, Secretary of Interior of the United States; Messrs. Watts, Looney, Nichols, Johnson & Hayes, 219 Couch Drive, Oklahoma City, Oklahoma 73102, counsel of record for the Appellee, Bruce Miller Townsend; Mr. Bruce Miller Townsend, 201 Denver Building, Seventh and Denver Streets, Tulsa, Oklahoma 74119, counsel of record for Appellees, Cherokee Delaware class and named individual members thereof; Mr. Joseph S. Fontana, Winston and Strawn, Suite 1040, 1730 Pennsylvania Avenue N.W., Washington, D.C. 2006, counsel of record for Appellee, Cherokee Delaware class, and named individual members thereof, by placing the same in the United States mail, first class postage fully prepaid; I further certify that I did, on the 15th day of March, 1976, serve three true and correct copies of the foregoing Jurisdictional Statement of Wanda June Weeks upon Mr. Henry B. Taliaferro, Jr., Casey, Lane and Mittendorf, 815 Connecticut Avenue N.W., Washington, D.C. 20006, counsel of record for Appellant, Wanda June Weeks; and Mr. Duard Barnes, Associate Solicitor, Office of the Solicitor, United States Department of the Interior, Washington, D.C. 20420, counsel of record

for the Appellee, Secretary of the Interior of the United States, by placing three copies of the same in the United States mail, airmail postage fully prepaid; I further certify that I did, on this 15th day of March, 1976, in conformity with 80 Stat. 613, 28 U.S.C. §518, serve three true and correct copies of the foregoing Jurisdictional Statement of Wanda June Weeks upon the Solicitor General, Office of the Solicitor General, Department of Justice, Washington, D.C. 20530, by placing the same in the United States mail, airmail postage fully prepaid; I further certify that all parties required to be served have been served.

Delmer L. Stagner

Supreme Court, U. S.
FILED
APR 5 1976
MICHAEL RODAK, JR., CLERK

In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-1328

WANDA JUNE WEEKS, ET AL., and
DOROTHY FRAZIER and RUTH RATTLER, ET AL.,
Appellants,

VERSUS

THE ABSENTEE DELAWARE TRIBE OF OKLAHOMA BUSINESS COMMITTEE; ARTHUR L. THOMAS; ALENE MARTINEZ; MYRTLE HOLDER; TOMMY HOLDER; LAWRENCE SNAKE; CHARLES TAYLOR, ET AL.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

MOTION TO DISMISS OR AFFIRM

BERNARD J. ROTHBAUM, JR.

Counsel for Appellees,
The Absentee Delaware Tribe of
Oklahoma Business Committee, et al.

of Counsel:

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323 Fidelity Plaza
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April, 1976

UTTERBACK TYPESETTING CO., 519 W. CALIF., OKLAHOMA CITY, PH. 235-0030

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Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

MOTION TO DISMISS OR AFFIRM

Appellees, Absentee Delaware Tribe of Western Oklahoma Business Committee, et al., pursuant to Rule 16 of the Rules of this Court, move to dismiss the appeal docketed by appellants, Wanda June Weeks and Dorothy Frazier and Ruth Rattler, on the grounds that the District Court was without proper jurisdiction of the parties or the subject matter under 28 U.S.C. 1331(a) because the question presented by appellants is a challenge to congressional determination of membership in two federally recognized Indian tribes, as such membership is defined for a particular statutory purpose, to-wit, payment of a judgment of the Indian Claims Commission and is, therefore, nonjusticiable under controlling decisions of this Court; that the Absentee Delaware Tribe of Western Oklahoma is an indispensable

party to this cause and is immune from suit without congressional authorization, which has not been given; that the District Court improperly assumed jurisdiction of this question; that this Court is, thus, without proper jurisdiction under 28 U.S.C. 1252; and, therefore, that this appeal should be dismissed.

In the alternative, appellees move that the final judgment of the District Court upholding the constitutionality of 86 Stat. 762, 25 U.S.C. 1291-1297, insofar as this statute includes the statutorily-defined membership of the Absentee Delaware Tribe of Western Oklahoma within its provisions, be affirmed, on the ground that the District Court gave full and complete consideration to appellants' arguments prior to finding them to be without merit; that the decision of the District Court is—on the merits—consistent with all decisions of this Court; and that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to warrant plenary review by this Court.

STATEMENT

This is a direct appeal from the final judgment entered on December 18, 1975, by a three-judge panel of the United States District Court for the Western District of Oklahoma, specially constituted pursuant to 28 U.S.C. 2282, upholding the constitutionality of 86 Stat. 762, 25 U.S.C. 1291-1297, insofar as this statute included the statutorily-defined members of the Absentee Delaware Tribe of Western Oklahoma within its distributive provisions.

In 1951, the Absentee Delaware Tribe of Western Oklahoma filed a claim before the Indian Claims Commission

seeking recompense for breach by the United States of the provisions of the Treaty of May 6, 1854, between the United States and the Delaware Tribe. 10 Stat. 1048. A similar claim was filed before the Indian Claims Commission by the Delaware Tribe of Oklahoma. The Commission assigned the Absentee Delaware Tribe's petition Docket No. 27A, and the Delaware Tribe's petition was assigned Docket No. 241. Thereafter, the two dockets were consolidated by the Indian Claims Commission and numerous legal questions, including whether the Absentee Delaware Tribe was a real party in interest, were litigated on the motion to dismiss of the United States. The Commission upheld appellees' real party in interest status and directed the case to go forward on the merits. *Delaware Tribe of Indians and Absentee Delaware Tribe of Oklahoma* v. *United States*, 2 Ind. Cl. Comm. 253 (1953). The United States appealed to the Court of Claims, which affirmed the Commission's judgment and specifically ruled upon essentially the same question appellants present here. *Delaware Tribe of Indians and Absentee Delaware Tribe of Oklahoma* v. *United States*, 130 Ct.Cl. 782, 787-789, 128. F.Supp 391, 398-399 (1955). After much further litigation, including six decisions by the Indian Claims Commission,[1] a Final Award was entered by the Commission and

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[1] *Delaware Tribe of Indians and Absentee Delaware Tribe of Oklahoma* v. *United States*, 3 Ind. Cl. Comm. 622 (1955); *Delaware Tribe of Indians and Absentee Delaware Tribe of Oklahoma* v. *United States*, 4 Ind. Cl. Comm. 346 (1956); *Delaware Tribe of Indians and Absentee Delaware Tribe of Oklahoma* v. *United States*, 8 Ind. Cl. Comm. 150 (1959); *Delaware Tribe of Indians and Absentee Delaware Tribe of Oklahoma* v. *United States*, 9 Ind. Cl. Comm. 1 (1960); *Delaware Tribe of Indians and Absentee Delaware Tribe of Oklahoma* v. *United States*, 21 Ind. Cl. Comm. 18 (1969).

See also the decision of the Court of Claims in *United States* v. *Delaware Tribe and Absentee Delaware Tribe of Oklahoma*, 192 Ct.Cl. 906, 427 F.2d 1218 (1970).

reported to Congress. The Final Award entered by the Commission in Dockets 72 and 298 (consolidated) named as petitioners the Absentee Delaware Tribe of Oklahoma and the Delaware Tribe of Indians.[2]

Following lengthy hearings before the House and Senate Indian Affairs subcommittees, Congress enacted 86 Stat. 762, 763, 25 U.S.C. 1291-1297 as the vehicle for distribution of this Final Award. The statute designates as the beneficiaries of the judgment defined members of the Delaware Tribe of Oklahoma and the Absentee Delaware Tribe of Western Oklahoma, each of whose tribal governing bodies receive ten per cent of the proportionate amount appropriated to their statutorily-defined membership. 25 U.S.C. 1294.

In 1973, appellant filed her complaint alleging that the terms of the statute were invidiously discriminatory because appellants were, by force of the Constitution, entitled to all funds appropriated, or which might be appropriated, to pay the Final Award entered by the Indian Claims Commission. The District Court entered a restraining order, after notice to the parties, on September 5, 1973. A preliminary injunction was entered, after notice and hearing, on March 21, 1974. The contentions of the appellants were extensively briefed and argued before the court below on appellees' motion to dismiss, appellants' reply thereto, cross-motions for summary judgment, and a special brief devoted exclusively to the question of the rationality of statute, filed pursuant to an order of the court below.

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[2] 21 Ind. Cl. Comm. 344.

On November 1, 1974, the District Court overruled the motion to dismiss as to the Federal defendants, and the named tribal defendants,[3] certified the litigation as a class action consisting of the appellant class, composed of descendants of certain members of the Delaware Tribe who had resigned from the Tribe, renounced Delaware citizenship, taken United States citizenship, and taken individual allotments of land in fee, pursuant to an 1866 treaty between the United States and the Delaware Tribe,[4] and the appellee Absentee Delaware Class consisting of the statutorily-defined members of the Absentee Delaware Tribe of Western Oklahoma, to-wit, those whose names were on, or eligible to be on, the 1940 constructed base roll of the Absentee Delaware Tribe.[5]

Thereafter, the District Court received the above-referenced briefs in support of cross-motions for summary judgment, considering in detail all issues between appellants and appellees and, *sua sponte*, ordered additional briefs devoted to the rationality of the distribution statute here at issue.

After receipt of these briefs, the District Court, during the course of one-day trial, received into evidence all documentary exhibits and evidence which appellants contended would support their claims, and ordered the parties to file proposed findings of fact and conclusions of law. On December 18, 1975, six months after the proposed findings and conclusions were filed, the District Court entered its

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[3] The United States was dismissed *eo nomine*.

[4] Treaty of July 1, 1866; 14 Stat. 793.

[5] 86 Stat. 762; 25 U.S.C. 1292.

final judgment unanimously rejecting appellants' contention that their class, alone, was, by command of the Constitution, entitled to receive all funds which Congress had distributed in 86 Stat. 762, 25 U.S.C. 1291-1297, and granting judgment for the defendant classes on this issue.

ARGUMENT

The unanimous decision of the District Court is plainly correct—on the merits—and the arguments advanced by appellants are so obviously unsubstantial as clearly not to warrant plenary consideration by this Court. Congress, by the statutory scheme appellants assail as unconstitutional, distributed two long-litigated Dockets adjudicated by the Indian Claims Commission. Appellants contend here, as they contended below, that Congress could not include anyone other than appellants in the distribution statute without violating the Constitution. Appellants' theory that the parties whom the Indian Claims Commission and the Court of Claims found to be real parties in interest entitled to prosecute the claims to judgment, on behalf of their respective entities, must be ignored in distribution of the award which they litigated for two decades has a singular status: novelty. Never in the history of the federal courts has a statute regarding the composition of statutorily-defined membership in an Indian tribe been vitiated by a federal court sitting in review of Congress' plenary power over Indian affairs. *See, e.g., Lone Wolf* v. *Hitchcock*, 187 U.S. 553; *Simmons* v. *Eagle Seelatsee*, 244 F.Supp. 808 (E.D. Wash.) *affirmed*, 384 U.S. 209. Certainly, never has the Judiciary, invoking the Due Process Clause, intimated that

a distribution plan enacted by Congress—after lengthy hearings and full consideration of the record developed over the course of twenty years by the Indian Claims Commission and the Court of Claims—is to be set aside on a blinkered version of history, put before a district court by dissatisfied litigants who wish to claim the fruits of the statute for their benefit. The court below unanimously rejected appellants' contention that the distribution statute was irrational in its inclusion of appellees. This conclusion is plainly correct and—on its merits—should be affirmed. Additionally, however, the District Court's judgment should be vacated since that court did not, as Chief Judge Daugherty pointed out below, (App. p. 84) possess proper jurisdiction to decide the nonjusticiable issues appellants raised, nor did the District Court possess proper jurisdiction over appellees as party defendant.

I.
DISMISSAL

(a) Nonjusticiability:

The District Court should have dismissed this action on the authority of *Lone Wolf* v. *Hitchcock*, 187 U.S. 553, 565-568, and the mass of federal case law which has been built upon that landmark decision. Appellants' assertion that their complaint is outside the rule of *Lone Wolf* because they are not challenging the composition of an Indian tribe's membership is refuted by appellants' own assertions, both to this Court and in the court below. Appellants assert that the proper membership of the entire Delaware Nation *for purposes of the statute here at issue, i.e.*, for payment

of the judgment in Indian Claims Commission Dockets 72 and 298, must, by force of the Constitution, be defined so as to be limited to them alone. Appellants further contend, as they contended unavailingly in the court below, that tribal membership, for purposes of this statute, has been wrongly defined and, therefore, excludes them. This is precisely the sort of complaint which has invariably been held nonjusticiable. *Lone Wolf* v. *Hitchcock, supra,* 187 U.S. 553, 565-568. See also, *e.g., Martinez* v. *Southern Ute Tribe,* 249 F.2d 915 (10th Cir., 1957); *Groundhog* v. *Keeler,* 442 F.2d 674 (10th Cir., 1971); *National Indian Youth Council* v. *Bruce,* 485 F.2d 97 (10th Cir., 1973); and *Tewa Tesuque* v. *Morton,* 498 F.2d 240 (10th Cir., 1974). While the District Court reached the correct result on the merits here, this does not alter the fact that the District Court did not have proper authority to adjudicate a question this Court has held to be nonjusticiable.

(b) Immunity:

The District Court should have dismissed appellants' complaint because the Absentee Delaware Tribe of Western Oklahoma was an indispensable party to this action, see, *e.g., Tewa Tesuque* v. *Morton, supra,* 498 F.2d 240, 242 (10th Cir., 1974), and, under this Court's explicit holding in *United States* v. *United States Fidelity and Guaranty Company,* 309 U.S. 506, 512-513, "Indian Nations [such as the Absentee Delaware Tribe] are exempt from suit without congressional authorization." Appellants attempted to avoid this Court's holdings by omitting the name of the tribal entity as a party defendant, which, obviously, can make no difference when, as here, the Tribe is an indispensable

party, *United States* v. *United States Fidelity and Guaranty Company, supra; Tewa Tesuque* v. *Morton, supra;* by asking a declaratory judgment against the defendant classes, *i.e.*, the statutorily-defined tribal membership, and by seeking injunctive relief only against the Secretary of the Interior who, by fortuity, had not paid out the funds which plaintiffs wished to claim for their own, on the date the suit was filed. This, appellants could not properly do since the Tribe was an indispensable party and "may not be joined without its consent or the consent of Congress in light of its quasi-sovereign status." *Tewa Tesuque* v. *Morton*, 498 F.2d 242. Therefore, the entire judgment of the District Court should be vacated for want of jurisdiction and remanded with instructions to dismiss.

II.
AFFIRMANCE

Apart from the jurisdictional question, the result reached by the District Court on the merits is so plainly correct and the contentions put forward in appellants' Jurisdictional Statement so clearly unsubstantial that the portion of the judgment below which appellants bring here should be summarily affirmed. Appellants argue here, as in the court below, that they possess a unique historical status which disables Congress from enacting legislation to pay this Claims Commission judgment to anyone but them. Specifically, appellants allege unconstitutionality in Congress' decision to treat the Absentee Delaware Tribe of Western Oklahoma as a party in interest to this judgment, on the ground that the Absentee Delaware tribal members

are descendants of Delaware tribal members who were not "with" the Tribe at "the time of the wrong" and who may not, therefore, share in the judgment. This contention, previously rejected by the Indian Claims Commission and the Court of Claims when substantially the same issue was before those tribunals, 2 Ind. Cl. Comm. 253 (1953), *affirmed on this issue*, 130 Ct.Cl. 782, 788-789, 128 F.Supp. 391, 398-399 (1955), and rejected by Congress, and the court below, gains no stature with repetition. The Indian Claims Commission, the Court of Claims, Congress and the unanimous court below, correctly realized that the presence of a particular tribe of the Delaware Indian Nation on a particular area of land at a particular point in time was an irrelevant issue, since, unlike some Indian tribes,[6] the Delaware Nation had never incorporated any concept of territoriality into its tribal law. Rather,

> "the rule and policy of the Delawares at that time [1854] was and has been to recognize all Delawares everywhere, who had maintained their identity as Delawares, as members of the Tribe . . . If, therefore, the alleged wrong had been actionable at the time it occurred, the absent members of the Tribe would have been entitled to share in the recovery."

Delaware Tribe of Indians and Absentee Delaware Tribe of Oklahoma v. *United States*, 130 Ct.Cl. 782, 788-789, 128 F.Supp. 391, 398-399 (1955) *affirming on this issue*, 2 Ind. Cl. Comm. 253 (1953). Thus, however broadly or narrowly the Treaty of 1854 is read, *but cf., Northwestern Shoshone Tribe* v. *United States*, 324 U.S. 335, 354 (Jackson, J., con-

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[6] *E.g.*, the Cherokee Indians. *See, Eastern Band of Cherokee Indians* v. *United States*, 117 U.S. 288 discussed in, F. Cohen Federal Indian Law, pp. 477-478 (Rev. Ed., 1958).

curring),[7] it is patent that no question of constitutional proportions is presented by appellants' challenge to this statute. The Senate Report which accompanied the legislation appellants assail through Congress, summarizing the lengthy findings of the Indian Claims Commission and the Court of Claims, correctly remarks that: "[t]he Delaware Nation was geographically scattered, but there was actually a strong inner cohesion. Lines of communication were stretched thin, but did not break." Senate Report No. 1518, 90th Cong. 2d Sess. p. 10. And, as the court below held, "this view is persuasive, and . . . Congress also was entitled to consider it in drawing the distribution statutes, along with the other historical evidence." App. p. 62 (opinion of the Court). And:

> "[t]he so-called Kansas Delawares stayed in Kansas, individually took an allotment of tribal land in Kansas in fee with power of alienation [and individually took other valuable benefits not available to Delaware tribal Indians] This most significant turn of events affords a rational basis for the Congress to distribute the award recommended by the Commission regarding tribal lands to these recognized Delaware Tribes [Delaware Tribe of Oklahoma and Absentee Delaware Tribe of Western Oklahoma], and to those on the rolls of these recognized Delaware Tribes."

App. p. 87 (Daugherty, J., dissenting in part).

Appellants suggest, without saying, that the holdings of the Indian Claims Commission and the Court of Claims

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[7] As Mr. Justice Jackson observed, Indian treaties with the United States present a sociological issue rather than a question of pure legal interpretation: "The treaty [with the Northwestern Shoshone Tribe] was a political document. It was intended to let the whites travel in peace a road they were going to travel anyway." *Id.*

in *Delaware Tribe of Indians and Absentee Delaware Tribe of Oklahoma* v. *United States, supra,* are inconsistent with this Court's decision in *Eastern Band of Cherokee Indians* v. *United States, supra.* Appellants are wrong. The very language which appellants cite: "If Indians wish to enjoy the benefits of the common property of the Cherokee Nation, . . . they must, . . . comply with the constitution and laws of the Cherokee Nation, and be re-admitted to citizenship as there [in the Cherokee constitution] provided. . . ." 117 U.S. 288, 310, demonstrates that *Eastern Band* turned on an interpretation of the "constitution and laws of the Cherokee Nation," while the decision in *Delaware Tribe and Absentee Delaware Tribe of Oklahoma* v. *United States, supra,* turned on "the rule and policy of the Delawares." 130 Ct.Cl. 782, 788, 128 F.Supp. 391, 399. The internal rules of the Cherokee Nation and the internal rules of the Delaware Nation were, simply, different. The Constitution does not require Congress to treat exactly alike those things which are different in fact. *Railway Express Agency* v. *New York,* 336 U.S. 106, 110; *Jefferson* v. *Hackney,* 406 U.S. 535, 545.

Moreover, even if *Eastern Cherokee, supra* and *Delaware Tribe, supra* were not factually distinguishable, it would avail appellants nothing. Both cases involve decisions under broad Acts of Congress specifically granting to the Judiciary the general jurisdiction to decide particular Indian claims on their particular merits. Neither suggests that its result is commanded by the Due Process Clause and neither suggests that Congress would be constitutionally disabled from differing with the decision should Congress, upon its own examination of the facts, elect to do so.

No case in this Court so suggests, even in regard to a prior decision of this Court expressly grounded upon the Constitution itself. *See, Katzenbach* v. *Morgan*, 384 U.S. 641, upholding congressional revision of this Court's constitutional holding in *Lassiter* v. *Northampton County Board of Elections*, 360 U.S. 45.

A fortiori, the rule is the same when the courts are merely interpreting a very broad congressional enactment such as the general jurisdiction-granting statutes under which *Eastern Band, supra*, and *Delaware Tribe, supra* were brought. *Cf., Kent* v. *Dulles*, 357 U.S. 116, 128-129.

And it needs no argument to demonstrate that, appellants to the contrary notwithstanding, all the facts put into evidence before the Indian Claims Commission, the Court of Claims, and Congress, need not have been reintroduced into evidence before the court below in order to uphold the constitutionality of the statute. The power of Congress to legislate is not straitjacketed by the size of the evidentiary record accumulated, *post facto*, before a District Court to justify Congress' decision. *See, Richardson* v. *Belcher*, 404 U.S. 78, 84:

> "We have no occasion within our limited function under the Constitution . . . to judge for ourselves whether the apprehensions of Congress were justified by the facts."

In any event, the findings of the Indian Claims Commission and the decision of the Court of Claims are judicially noticeable without reintroduction of the evidentiary records before those tribunals. 25 U.S.C. 70t. *Cf., United States* v. *Southern Ute Tribe*, 402 U.S. 151 *and, Rowan* v. *United States Post Office Department*, 397 U.S. 728.

The holding of the unanimous court below that appellants had raised no constitutional issue, let alone a constitutional issue sufficient to vitiate this Act of Congress, was fully supported by the evidence before the court, the evidence before Congress and the detailed history of the Absentee Delaware Tribe explicated by the Indian Claims Commission and the Court of Claims, and transmitted to Congress pursuant to 25 U.S.C. 70t. The decision below is plainly correct and conflicts with no decision of this Court. It is in accord with all decisions of this Court which have—pursuant to specific statutory authority—reached the merits of such an Indian claims case, including *Eastern Band of Cherokees* v. *United States, supra*. Thus, even assuming the decision below should not be vacated in its entirety and remanded with instructions to dismiss, it should, at the very least, be summarily affirmed.

One collateral point deserves mention. Appellants' quite candid attempt at bootstrapping through noting that appellees here, as well as the Secretary of the Interior, have noticed appeal to this Court from so much of the decision of the majority below as holds that Congress was *constitutionally required* to partially *include* appellants in the terms of this distribution statute, and suggesting that probable jurisdiction should be noted as to all appeals if it is noted as to any, is without merit. The decision of the majority below, insofar as it holds appellants have a constitutional right to be included in the terms of the distribution statute here at issue, and enjoining the statute's operation, presents a holding of first impression and of extraordinary importance in Federal Indian law. Probable jurisdiction should be noted as to the appeals from this

portion of the District Court's judgment for the reasons set forth in the Jurisdictional Statements of the appealing parties who were defendants below.

Per contra, it is clear that no substantial constitutional question warranting plenary review in this Court is presented by the District Court's entry of judgment for appellees in regard to the issue which appellants here present.

CONCLUSION

For the reasons, and upon the authorities above cited, it is submitted that this appeal presents no issues warranting plenary review in this Court and that the judgment of the unanimous court below on these issues should be either vacated and remanded for want of proper jurisdiction in the court below, or, alternatively, should be summarily affirmed.

Respectfully submitted,

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April, 1976

CERTIFICATE OF SERVICE

I, Bernard J. Rothbaum, Jr., a member of the Bar of the Supreme Court of the United States, hereby certify that I did, on this ___ day of April, 1976, mail, postage prepaid, three true and correct copies of the above and foregoing Motion to Dismiss or Affirm to: Mr. Delmer L. Stagner, Suite 700, 101 Park Avenue Building, Oklahoma City, Oklahoma 73102; Mr. John G. Ghostbear, 340 Arcade Building, Tulsa, Oklahoma 74103, and Mr. Henry B. Talliaferro, Jr., 315 Connecticut Avenue, Washington, D.C. 20006, counsel of record for appellants Wanda June Weeks, Dorothy Frazier and Ruth Rattler; I further certify that I did, on this ___ day of April, 1976, mail, postage prepaid, three true and correct copies of the foregoing Motion to Dismiss or Affirm upon the Solicitor General, United States Department of Justice, Washington, D.C. 20005; I further certify that I did on this ___ day of April, 1976, mail, postage prepaid, three true and correct copies of the above and foregoing Motion to Dismiss or Affirm to all counsel of record for all appellees; I further certify that all parties required to be served have been served, in conformity with Rule 33 of the Rules of the Supreme Court.

Bernard J. Rothbaum, Jr.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1328

WANDA JUNE WEEKS, *Appellant,*

v.

THOMAS S. KLEPPE, Secretary of the Interior of the United States of America and Trustee for the Delaware Indian People; THE DELAWARE TRIBAL BUSINESS COMMITTEE; THE ABSENTEE DELAWARE TRIBE OF OKLAHOMA BUSINESS COMMITTEE; BRUCE MILLER TOWNSEND; NATHAN H. YOUNG; MARY TOWNSEND CROW; HENRY A. SECONDINE; Y. A. SCOTT; ARTHUR L. THOMAS; ALENE MARTINEZ; MYRTLE HOLDER; LAWRENCE SNAKE; and CHARLES TAYLOR, *Appellees,*

and

DOROTHY FRAZIER and RUTH RATTLER, on their own behalf and on behalf of all those similarly situated, *Appellants,*

v.

THOMAS S. KLEPPE, individually and in his capacity as Secretary of the Interior of the United States of America, *Appellee,*

THE DELAWARE TRIBE OF INDIANS, *Intervenor.*

On Appeal from the United States District Court for the Western District of Oklahoma

MOTION OF DELAWARE TRIBAL BUSINESS COMMITTEE, NAMED MEMBERS THEREOF, AND INTERVENOR DELAWARE TRIBE OF INDIANS TO AFFIRM IN PART

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MOTION OF DELAWARE TRIBAL BUSINESS COMMITTEE, NAMED MEMBERS THEREOF, AND INTERVENOR DELAWARE TRIBE OF INDIANS TO AFFIRM IN PART

MOTION TO AFFIRM IN PART

Appellees, The Delaware Tribal Business Committee, Bruce Miller Townsend, Nathan H. Young, Mary Townsend Crow, Henry A. Secondine, and Y. A. Scott, and Intervenor, The Delaware Tribe of Indians, appellants in connected Case No. 75-1301, pursuant to Rule 16 of the Rules of this Court, move to affirm the Judgment below insofar as it decrees that Pub. L. 90-508, 82 Stat. 861, 25 U.S.C. §§ 1181-86 (1970), is constitutional and denies appellants the relief they prayed, Jurisdictional Statement, app. A, p. 3, para. 2, and insofar as it decrees that Pub. L. 92-456, 86 Stat. 762, 25 U.S.C. §§ 1291-97 (Supp. IV, 1974), is valid insofar as it provides for the inclusion of the Cherokee Delaware class and the Absentee Delaware class in the distribution to satisfy Indian Claims Commission awards in Dockets 72 and 298, *id.* at para. 3 to its first semicolon, on the ground that it is manifest that the questions on which decision of this appeal depend are so insubstantial as not to warrant further argument.

Appellants are descendants of 21 adult and 49 minor Delawares, Jurisdictional Statement, app. B, p. 14, who, by the terms of the 1866 Treaty with the Delaware Indian Tribe renounced citizenship in the tribe and became, as are their descendants, citizens solely of the United States. They number approximately 700 persons. The tribal Indians whom they oppose, the Delaware Tribe of Indians ("Cherokee Delawares") and the Absentee Delaware Tribe of Western Oklahoma, number approximately 7,765 and 1,808 persons, respectively. The two statutes, 25 U.S.C. §§ 1181-86 (1970) and 25 U.S.C. §§ 1291-97 (Supp. IV, 1974), distributing congressional appropriations to honor awards of the Indian Claims Commission are for wrongs done to the Dela-

ware Tribe in 1818 and 1854, respectively. The first award (Docket 337) is for $1.62 million, plus interest; the second (Dockets 72 and 298) is for $9.17 million, plus interest.

The purpose of this appeal is to obtain rulings by this Court that the *only* beneficiaries of the $9.17 million award with respect to the 1854 wrong shall be the appellants, citizens solely of the United States, as have been their ancestors since 1866; secondly, that while they may participate in the $1.62 million award for the 1818 wrong, the 7,765 Cherokee Delawares may not.[1]

The brazen, unsavory propositions advanced on behalf of the so-called Kansas Delawares were fully examined below and rejected by a unanimous court. Jurisdictional Statement, app. B, pp. 55-62.

Manifestly, it scarcely would right a wrong done to an Indian tribe to give $9.61 million to citizens solely of the United States, tribal expatriates for 110 years, while the smallest Indian tribal group (but over twice as large as the U.S. citizen group) received but $1.17 million and by far the largest Indian tribal group was turned out of court entirely uncompensated after 25 years of successful litigation of treaty violations now conceded

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[1] As we roughly compute it, elimination of the Cherokee Delawares from participation in the $1.62 million award would increase the so-called Kansas Delawares participation therein from about 6.8 percent to approximately 28 percent, or about $454,000. Under their contentions, then, these Indian and tribal expatriates would take *all* of the $9.17 million award and $454,000 of the $1.62 million award for a total of about $9.62 million, leaving approximately $1.17 million (or less because of other factors not relevant here), for the Absentee Delaware Tribe or its tribal members on a *per capita* basis—*nothing for the Delaware Tribe of Indians or its members.*

by the United States. The Constitution neither authorizes nor requires such an absurdity or mockery of the purpose of the Indian Claims Commission Act.

This Court recently approved, in the face of a constitutional challenge, a congressional policy of preference for tribal Indians in the hiring and promotion practices of the Bureau of Indian Affairs and recognized as proper legislation "on behalf of federally-recognized Indian Tribes." *Morton* v. *Mancari*, 417 U.S. 535, 551-55, and n.24 (1974). There seems scant likelihood that the Court is going to reverse field and deny, for the benefit of non-Indians, reimbursement to tribal Indians who have maintained and cherished their tribal membership.

Unless the Court feels there is a reasonable prospect that it could be persuaded to adopt appellants' unconscionable proposition and reverse the unanimous opinion below there is nothing to be gained by a detailed, time-consuming, and costly examination of the exceedingly attenuated arguments advanced for the Kansas Delawares' appeal.

Moreover, appellants' arguments can be stated only by subtly placing an unwarranted gloss upon the facts found by the District Court and by rearguing facts not so found. The appeal is taken against these appellees simply to contend that there is no rational basis for including members of the Delaware Tribe of Indians in the compensation for wrongs done to that tribe in 1818 and in 1854 because the Delaware tribe "dissolved" and vanished by the terms of the 1867 agreement with the Cherokees.

Appellants rely in the fabrication of their argument on facts not found by the District Court and rejection of

facts found controlling by the lower court. This Court, we submit, does not sit for the purpose of *de novo* factual review. "Findings of fact shall not be set aside unless clearly erroneous", FED.R.CIV.P. 52(a); *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969), but appellants make no pretense that the District Court has committed factual error. The factual basis for recognition of the rights of the Delaware Tribe to these claims awards is translucently clear on the record. The Indian Claims Commission recognized "The Delaware Tribe of Indians" and "The Absentee Delaware Tribe of Western Oklahoma" and their rights to pursue the claims at issue.[2] The distribution statute

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[2] In Indian Claims Commission Dockets 27A and 241 the same Delaware Tribe of Indians and Absentee Delaware Tribe of Oklahoma pursued claims based on the same 1854 treaty involved in the appeal herein. The United States challenged the rights of both groups to pursue the claims of the Delaware Nation. 2 Ind.Cl. Comm. 253 (1952). The rights of the two tribes were upheld. In Finding No. 8, the Commission stated:

> The Delaware Indians who removed to the Cherokee territory became members and citizens of the Cherokee Nation, but they and their descendants . . . maintained group identity, receiving annual payments from their own tribal funds, having tribal chiefs and groups and business committees continuously until the present time, and at this time. *Id.* at 260.

The Commission, in its Opinion, further elaborated on Finding No. 8:

> It is undisputed that the main body of the Delawares and the group with whom the [United States] dealt as representing the Delaware Nation following the treaty of September 24, 1829, removed to the reservation ceded to the Delawares in Kansas, and that following the agreement of April 8, 1867, this group removed to the Cherokee Territory and its members, or most of them, became incorporated and merged for many purposes with the Cherokees. Nevertheless, this incorporation and merger did not result in the destruction of the continued activities of those so incorporated with the Cherokees as a dis-

for Dockets 72 and 298 does the same. Jurisdictional Statement, app. H, p. 103. These recent acts represent a continuation of the long legal tradition of congressional and executive involvement with the Cherokee Delawares as a distinct tribal entity.[3]

The District Court found:

> The Delaware Indians who removed to the Cherokee territory became members and citizens of the Cherokee Nation, but they and their descendants maintained group identity. Jurisdictional Statement, app. B, pp. 15-16.

> tinct identity. They continued to maintain their tribal customs, practices, and their hereditary form of Delaware government. They received annual payments for many years from their own tribal funds, separate from the Cherokees. They had separate tribal funds in the hands of the U.S. as late as 1906. They were governed by hereditary tribal chiefs until the death of Charles Journeycake in 1895. Thereafter, they maintained a tribal council and business committee to perform the functions and duties previously performed by their chiefs. This tribal council and business committee have continuously functioned as an identifiable group. *Id.* at 265.

The Commission's findings was affirmed by the Court of Claims, *Delaware Tribe of Indians* v. *United States*, 128 F.Supp. 391, 398 (Ct. Cl. 1955), and became the basis of the subsequent Commission awards to the Delawares in Dockets 337 and 72 and 298. *Absentee Delaware Tribe of Oklahoma* v. *United States*, 9 Ind.Cl.Comm. 346 (1961) (Docket 337); *Delaware Tribe of Indians* v. *United States*, 21 Ind.Cl.Comm. 344, 345, 350 (1969) (Dockets 72 and 298).

[3] For example, Section 21 of the Act of April 21, 1905, 33 Stat. 222, authorized the Secretary of the Treasury to pay $150,000 as a claims settlement to "the Delaware Tribe of Indians residing in the Cherokee Nation, as said tribe shall in council direct . . . ." The amount appropriated was credited to the Delaware Tribe by treasury warrant and was disbursed in per capita payments to members of the tribe annually from 1906 to 1923, inclusive. *Delaware Tribe of Indians* v. *United States*, 2 Ind.Cl.Comm. 536, 547-48 (1954) (Finding of Fact. No. 13).

And in its footnote 12, the Court found:

> We are unable to agree with the Kansas Delawares' contention, and find that the Cherokee Delawares have maintained group identity, having tribal chiefs and business committees continuously until the present time. *Id.* at p. 16.[4]

There can be no question of the weight and import of the court's finding, based as it is upon a final finding of fact of the Indian Claims Commission reviewed and affirmed by the Court of Claims. Such findings are intended by Congress to be conclusive and binding on Congress in the distribution of Indian Claims judgments. 25 U.S.C. §§ 70s(b), (c) and 70u(a) (1970); H.R.REP. No. 2693, 79th Cong., 2d Sess. 8 (1946).

The theory of Delaware tribal dissolution is not structured on fact nor is it supportable in law. Appellants concede there exists no legal precedent for the theory. Jurisdictional Statement, p. 32.[5] This Court affirmed

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[4] The District Court's findings were based on Findings of Fact No. 49 and 50 in Docket 337. *Id.* at p. 16. These findings, 5 Ind. Cl.Comm. 491-92 (1957), were in turn based on the petitioner's evidence in Docket 27A, and Finding No. 50 quotes directly the language and substance of Finding No. 8 in Dockets 27A and 241. *See* note 2, *supra.*

[5] Appellants rely for their primary support in law on the decision of this Court in *Delaware Indians* v. *Cherokee Nation*, 193 U.S. 127 (1904), in which it was stated that the children of those Delawares who purchased Cherokee citizenship were native-blood Cherokees and "had all of the rights of Cherokee citizens 'and no more.'" *Id.* at 138; Jurisdictional Statement, pp. 15-16, 32, 35. They conclude that by this language the Court meant that the children in question had lost all rights as Delawares and that the Delaware tribe in fact had ceased to exist.

This construction is patently unfounded. The case involved adjudication of the land rights of the Delawares as against the

the existence of distinct Delaware tribal rights when it stated in 1894 that the Delawares had the right to maintain tribal trust funds separate from the national fund of the Cherokees for the benefit of Delaware people. *Cherokee Nation* v. *Journeycake,* 155 U.S. 196, 213 (1894).

In sum: the Kansas Delawares seek a plenary hearing looking to an end result we seriously doubt this Court will ever reach, no matter how many briefs be filed or arguments heard—the preference of United States citizens whose ancestors renounced Indian citizenship to the exclusion of tribal Indians in the recompense of treaty wrongs to the tribe. Appellants seek to reach that shocking result in substantial part by contradicting findings of fact on which the District Court was unanimous.

Since the relief and the issues presented by the instant appeal are distinct and severable from those which these appellees have raised as appellants in case 75-1301 and representatives of the Absentee Delaware Tribe have raised in case 75-1335, appellants' suggestion that jurisdiction should be noted here if it is noted in either or both of those cases is without merit. We respectfully pray that the judgment of the District Court be affirmed in the respects specified in the opening of this motion.

Cherokee Nation and had nothing whatsoever to do with the determination of either Delaware treaty rights against the United States or tribal existence. The Court simply held that the Delawares purchased the same rights to land, *i.e.*, a right of use and occupancy, not fee title, as were accorded individual Cherokees under their tribal constitution. 193 U.S. at 137-38. The Delawares had the same rights in land as the Cherokees—*and no more.*

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1975

WANDA JUNE WEEKS, ET AL., APPELLANTS

v.

THOMAS J. KLEPPE, SECRETARY OF THE INTERIOR, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

MOTION TO AFFIRM

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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1328

WANDA JUNE WEEKS, ET AL., APPELLANTS

v.

THOMAS J. KLEPPE, SECRETARY OF THE INTERIOR, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

MOTION TO AFFIRM

Pursuant to Rule 16(1)(c) of the Rules of this Court, Thomas J. Kleppe, Secretary of the Interior, moves that the judgment of the district court be affirmed insofar as it holds that the Act of September 21, 1968, 82 Stat. 861 *et seq.*, 25 U.S.C. 1181-1186, and the Act of October 3, 1972, 86 Stat. 762 *et seq.*, 25 U.S.C. (Supp. IV) 1291-1297, are constitutional.[1]

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[1]The Secretary has sought review in No. 75-1495 of that portion of the district court's judgment holding 25 U.S.C. (Supp. IV) 1291-1297 invalid. See n. 3, *infra*.

STATEMENT

This is a direct appeal from those portions of the final judgment of a three-judge district court that upheld the constitutionality of 25 U.S.C. 1181-1186 and 25 U.S.C. (Supp. IV) 1291-1297 (J.S. App. 1-4). These statutes appropriate funds to satisfy judgments of the Indian Claims Commission that compensate the Delaware Tribe of Indians for wrongs done to the tribe by the United States in 1818 and 1856-1857.

1. The Delaware Indians originally lived on the east coast of what is now the United States but, by the second decade of the 19th century, they were geographically scattered. Although the main branch of the tribe lived in Indiana and Ohio, some members (the Munsee Indians) resided in New York and Canada, while others lived on a tract of land in Missouri that had been granted by Spain in 1793, and still others were located in Texas, Arkansas, and Oklahoma. In the Treaty of St. Mary's in 1818, 7 Stat. 188, the Delawares ceded their lands in Indiana to the United States in return for a promise of land west of the Mississippi River. The Delawares then moved to the Missouri tract, where they remained until 1829 (J.S. App. 11-12).

In September 1829, the Delawares signed another treaty with the United States, supplementing the 1818 treaty, in which they agreed to give up their temporary residence in Missouri and to move to a permanent residence in Kansas. 7 Stat. 327. These Kansas lands purported to satisfy the federal government's obligation under the 1818 treaty to provide the Delawares with a home west of the Mississippi. Although most of the Delawares moved to the land assigned them in Kansas, a substantial group (the Absentee Delawares) settled in Oklahoma, where they have maintained their tribal identity, with chiefs and a

tribal council, to the present day (J.S. App. 12). The Absentee Delawares constitute a federally-recognized tribe.

In 1854, the nucleus of the Delaware Tribe, then living in Kansas, entered into a treaty with the United States in which they ceded most of their lands to the federal government. 10 Stat. 1048. Part of this territory was reserved for the Delawares as a permanent home (the "diminished reserve"), while the bulk of the remainder (the "trust lands") was to be sold by the government at public auction with the proceeds going to the Delaware general tribal fund. In 1856 and 1857, however, the United States violated the terms of the treaty by improperly selling the trust lands without a public auction. As a result, the Delawares received far less money from the disposition than they should have obtained (J.S. App. 13).

In 1860, the United States agreed by treaty to survey the diminished reserve and to grant each Delaware Indian (including women and children) an 80-acre tract of land with restricted title. 12 Stat. 1129. As to the Absentee Delawares, Article IV of the treaty expressly provided (12 Stat. 1130-1131):

> Whereas some years ago a good many of the Delawares went down among the Southern Indians, and as there are still about two hundred of them there, and as they have reason to believe they will return soon, it is hereby agreed that eighty acres each be set apart for them, to be allotted to them as they return, and certificates to be then issued to them, in the same manner as to those now within the reservation * * * .

Finally, in 1866, the Delawares entered into another treaty with the United States in which they agreed to move to Indian Country in Oklahoma. 14 Stat. 793.

Under the treaty, the diminshed reserve was to be sold and the proceeds used to buy 160-acre tracts of land in Oklahoma for each tribal member. In addition, all adult Delawares were to be given the opportunity either to remove to Oklahoma with the tribe or, instead, to dissolve all tribal relations and to become citizens of the United States. Each Delaware who chose to leave the tribe was to receive fee simple title to an 80-acre plot in the reserved Kansas lands and his *pro rata* portion of the tribal assets (J.S. App. 14). The treaty further provided that Indians electing to become citizens of the United States "shall cease to be members of the Delaware tribe, and shall not further participate in their councils, nor share in their property or annuities." 14 Stat. 796. Appellants, the so-called "Kansas 'Delawares'," are the descendants of those Indians who severed all relations with the Delaware Tribe in 1866, received their proportionate share of the tribal assets, and remained in Kansas as American citizens (J.S. App. 15).[2]

By 1867 most of the Delawares had moved to Oklahoma, where they each received a life estate of 160 acres of land on the Cherokee reservation. Although these Indians became members and citizens of the Cherokee nation, they retained a group identity as Delawares (J.S. App. 15-16). Their descendants are the Cherokee Delawares, a federally-recognized tribe.

2. In 1951, members of the Absentee Delawares filed suit in the Indian Claims Commission on behalf of the

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[2]A total of 21 adults and 49 minors remained in Kansas. The minors did not formally become citizens of the United States until 1874, when Congress appropriated funds to pay them a proportionate share of the assets of the Delaware Tribe and directed the Secretary of the Interior to issue fee simple title to lands allocated to them in the 1866 treaty (J.S. App. 16-17). 18 Stat. 146, 175.

Delaware Nation to challenge as inadequate the compensation received under the 1818 treaty. The Commission found that the value of the Indiana lands ceded to the United States in 1818 was greatly in excess of the value of the Kansas lands received by the Delawares in return in 1829, and awarded $1,627,244.64 to the Delaware Nation (J.S. App. 17). By Act of September 21, 1968, 82 Stat. 861 *et seq.*, 25 U.S.C. 1181-1186, Congress appropriated funds to satisfy this judgment and ordered the Secretary of the Interior to distribute the funds to the following (25 U.S.C. 1181; J.S. App. 100-101):

> (a) Indians whose "name or the name of a lineal ancestor appears on the Delaware Indian per capita payroll approved by the Secretary on April 20, 1906"; or
>
> (b) Indians whose "name or the name of a lineal ancestor is on or is eligible to be on the constructed base census roll as of 1940 of the Absentee Delaware Tribe of Western Oklahoma, approved by the Secretary of the Interior"; or
>
> (c) Indians who "are lineal descendants of Delaware Indians who were members of the Delaware Nation of Indians as constituted at the time of the Treaty of October 3, 1818 (7 Stat. 188), and their name or the name of a lineal ancestor appears on any available census roll or any other records acceptable to the Secretary."

Thus, the Cherokee Delawares (through the first provision), the Absentee Delawares (through the second provision), and the Kansas "Delawares" (through the third, or "catchall," provision) all were eligible to participate in this distribution.

Subsequently, the Absentee and Cherokee Delawares brought a second suit in the Indian Claims Commission for an accounting under the 1854 treaty relating to the sale of the "trust lands." The Commission concluded that these lands had not been sold at public auction, contrary to the terms of the treaty, and awarded the Delawares $9,168,171.13, including interest from 1857 (J.S. App. 19-20). In the Act of October 3, 1972, 86 Stat. 762 *et seq.*, 25 U.S.C. (Supp. IV) 1291-1297, however, Congress adopted a distribution plan for payment of this judgment that differed from the distribution set forth in 25 U.S.C. 1181-1186; ten percent of the award was to be paid directly to the Cherokee and Absentee Delaware Tribes for uses approved by the Secretary, while the remaining ninety percent was to be divided among individuals in categories (a) and (b) above. Thus, since the "catchall" provision (c) was not included in the distribution statute, the Kansas "Delawares" did not share in the second award (J.S. App. 21).

3. Appellants, representatives of a class of descendants of the Kansas "Delawares," instituted this action in the United States District Court for the Western District of Oklahoma against the Secretary of the Interior and the Cherokee and Absentee Delawares to challenge the constitutionality of the distribution statutes, 25 U.S.C. 1181-1186 and 25 U.S.C. (Supp. IV) 1291-1297. Specifically, appellants alleged that the inclusion of the Cherokee Delawares in the distribution authorized by 25 U.S.C. 1181 and the inclusion of the Cherokee and Absentee Delawares in the distribution authorized by 25 U.S.C. (Supp. IV) 1292 violated their rights to due process of law and just compensation under the Fifth Amendment by improperly diluting their share of the judgment funds. Appellants further alleged that 25 U.S.C. (Supp. IV) 1292 violated principles of equal protection embodied

in the Due Process Clause of the Fifth Amendment by excluding them from sharing in that distribution.

A three-judge district court rejected appellants' constitutional attack on the inclusion of the Cherokee and Absentee Delawares in the distribution statutes (J.S. App. 5-90; 406 F. Supp. 1309). The court held that Congress could rationally include the Absentee Delawares in the award redressing the breach of the 1854 treaty, despite the fact that the Absentees lived apart from the main tribal body at that time, because the Absentee Delawares were members of the Delaware Tribe in 1854 and were recognized as such (J.S. App. 60-62). The court held in addition that Congress properly allowed the Cherokee Delawares to participate in both distributions because their members are lineal descendants of the tribe injured by the wrongs (J.S. App. 56-59).[3]

ARGUMENT

Appellants contend that 25 U.S.C. 1181-1186 and 25 U.S.C. (Supp. IV) 1291-1297 deprive them of property without just compensation and are so irrational that they violate the Due Process Clause of the Fifth Amendment. The district court correctly rejected these arguments on the basis of findings of fact that are amply supported by the record and legal principles that have repeatedly been applied by this and other courts. Appellants have presented no issue warranting plenary consideration by this Court.

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[3]The court, with one judge dissenting, declared 25 U.S.C. (Supp. IV) 1292 unconstitutional insofar as it failed to include appellants, whose ancestors were among the Indians injured by the government's breach of the 1854 treaty, in the class of persons entitled to share in the second distribution. The Cherokee Delawares, the Absentee Delawares and the Secretary have sought review of this portion of the district court's judgment in Nos. 75-1301, 75-1335, and 75-1495.

1. Appellants' claims under the Just Compensation Clause of the Fifth Amendment are insubstantial. Judgments of the Indian Claims Commission are tribal property, since they redress wrongs done to the tribe rather than to individual Indians. See *Cherokee Nation* v. *Hitchcock*, 187 U.S. 294, 307. As with all such property, rights do not vest in individuals until the judgment funds have been distributed. *Minnesota Chippewa Tribe* v. *United States*, 161 Ct. Cl. 258, 270-271, 315 F.2d 906, 913-914; *Cherokee Freedmen* v. *United States*, 195 Ct. Cl. 39, 50-51.

In *United States* v. *Jim*, 409 U.S. 80, for example, Congress passed a statute in 1933 giving Indians living on a portion of the Navajo reservation the benefit of any minerals that might be found on their land. In 1968 Congress enacted new legislation enlarging the class of Indians within the tribe who were entitled to share in the mineral royalities. In upholding the latter statute against the claim that it constituted an unconstitutional taking of property without just compensation, this Court stated (409 U.S. at 82-83):

> It is settled that "[w]hatever title the Indians have is in the tribe, and not in the individuals, although held by the tribe for the common use and equal benefit of all the members." *Cherokee Nation* v. *Hitchcock*, 187 U.S. 294, 307; *Delaware Indians* v. *Cherokee Nation*, 193 U.S. 127, 136. * * *
>
> Congress had not deprived the Navajo of the benefits of mineral deposits on their tribal lands. It has merely chosen to re-allocate the * * * royalties * * * in a more efficient and equitable manner. This was well within the power of Congress to do so. As no "property," in a Fifth Amendment sense, was conferred upon residents of the [reservation] by the 1933

Act, no violation of the Fifth Amendment was effected by the 1968 legislation.

See also *Northern Cheyenne Tribe* v. *Hollowbreast*, No. 75-145, decided May 19, 1976, slip op. 7 ("The Court has consistently recognized the wide-ranging congressional power to alter allotment plans until those plans are executed."); *Sizemore* v. *Brady*, 235 U.S. 441, 449; *Gritts* v. *Fisher*, 224 U.S. 640, 648.

2. Appellants contend that their right to due process of law under the Fifth Amendment was violated by Congress' inclusion of the Cherokee and Absentee Delawares in the distribution of judgment funds for wrongs under the 1854 treaty and by Congress' inclusion of the Cherokee Delawares in the distribution of judgment funds for wrongs under the 1818 treaty.

a. Although appellants apparently do not question that the Absentee Delawares were members of the Delaware Tribe at the time of the breach of the 1854 treaty in 1856 and 1857 (J.S. 9),[4] they assert that tribal membership should not be the determinative factor in the distribution of judgment funds. Instead, appellants refer to several historical facts (J.S. 28), primarily that the Absentees did not reside with the main body of the tribe in Kansas in 1854, to demonstrate that the Absentee Delawares were not "wronged" by the breach of the treaty.

Congress properly concluded, however, that membership in the tribe, as evidenced by tribal determinations at

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[4]Appellants also concede that this case raises no contested issues of material fact (J.S. 23).

or about the time of the wrong, should be the controlling factor in deciding which individuals would share in an award.[5] As this Court stated in *Halbert* v. *United States,* 283 U.S. 753, 762-763:

> The rule is general that, in the absence of provision to the contrary, the right of individual Indians to share in tribal property, whether lands or funds, depends on tribal membership and is terminated when the membership is ended.

See also Cohen, *Handbook of Federal Indian Law* 185-186 (1942).

While Indians who sever their tribal relationship and live apart from the tribe therefore lose their right to participate in tribal assets (*Eastern Band of Cherokee Indians* v. *United States,* 117 U.S. 288; *Miami Tribe of Oklahoma* v. *United States,* 150 Ct. Cl. 725, 281 F.2d 202), an Indian group that was physically separated from the main tribal body at the time of a wrong to the tribe may nonetheless share in an award redressing the wrong if it retained tribal membership and was recognized by the tribe as having done so. *Delaware Tribe of Indians* v. *United States,* 130 Ct. Cl. 782, 128 F. Supp. 391. Here, there was substantial evidence to justify Congress' conclusion that, despite their physical separation from the Delaware Tribe, the Absentee Delawares were considered to be members of the tribe in 1856 and 1857. For example, Article IV of the 1860 treaty between the United States and the Delawares provided (12 Stat. 1129, 1130):

> Whereas some years ago a good many of the Delawares went down among the Southern Indians,

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[5]The 1854 treaty refers to the "Delaware tribe of Indians" (10 Stat. 1048, 1049) and the trust fund established in Article 7 of the treaty was made "for the benefit of the Delaware people" (10 Stat. 1050).

> and as there are still about two hundred of them there, and as they have reason to believe they will return soon, it is hereby agreed that eighty acres each be set apart for them, to be allotted to them as they return * * * .

Indeed, this precise question was considered in 1955 by the Court of Claims, which concluded after a study of the Delaware tribal relations a century earlier (*Delaware Tribe of Indians* v. *United States, supra,* 130 Ct. Cl. at 796; 128 F. Supp. at 399):

> We think that the rule and policy of the Delawares [in 1854] was and had been to recognize all Delawares everywhere, who had maintained their identity as Delawares, as members of the tribe. If, therefore, the alleged wrong had been actionable at the time it occurred, the absent members of the tribe would have been entitled to share in the recovery.

This factual conclusion does not conflict with this Court's decision in *Eastern Band of Cherokee Indians* v. *United States, supra,* or other decisions on which appellants rely. In *Eastern Band,* the Court found that the Cherokees in North Carolina had dissolved their connection with their tribe when they refused to accompany it on its removal by treaty to lands west of the Mississippi River and that they had become "aliens to their Nation." 117 U.S. at 312.[6] As noted above, the historical record in this case is otherwise. Thus, the district court correctly concluded (J.S. App. 62):

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[6]The Cherokee constitution of 1838 also provided (117 U.S. at 305):

> that whenever any citizen shall remove with his effects out of the limit of this nation and become a citizen of any other government, all his rights and privileges as citizen of this nation shall cease * * *.

> [T]here is support for the position that the Delaware tribe in 1854 recognized the Absentees as members of the tribe. In these circumstances we cannot say the Congress had no rational basis for the inclusion of the Absentees in the provisions for distribution for the award to redress the 1854 wrong.

b. Appellants' claim that the Cherokee Delawares may not participate in the distribution of judgment funds for wrongs committed under the 1818 and 1854 treaties because they are members of the Cherokee Tribe is, as appellants concede (J.S. 32), wholly without legal support. Indeed, this Court has held that the Cherokee Delawares, although now part of the Cherokee Tribe, are entitled to share in the Delaware tribal funds. *Cherokee Nation* v. *Journeycake*, 155 U.S. 196, 213. Congress therefore properly included the Cherokee Delawares in the distribution statutes, regardless of their current tribal membership, because they unquestionably are lineal descendants of members of the injured tribe at the time of the wrongs, and have maintained a group identity as Delawares (J.S. App. 15-16).

3. We submit that the rational basis for Congress' decision to include the Cherokee and Absentee Delawares in the distributions authorized by 25 U.S.C. 1181-1186 and 25 U.S.C. (Supp. IV) 1291-1297 is clear. In view of the broad authority of Congress to distribute tribal property in the manner it views as most beneficial to the affected Indians (see, *e.g.*, *Northern Cheyenne Tribe* v. *Hollowbreast*, *supra*; *United States* v. *Jim*, *supra*; *Simmons* v. *Seelatsee*, 384 U.S. 209, affirming, 244 F. Supp. 808 (E.D. Wash.); *Board of County Commissioners* v. *Seber*, 318 U.S. 705, 718; *Winton* v. *Amos*, 255 U.S. 373, 391; *Williams* v. *Johnson*, 239 U.S. 414, 420; *Lone Wolf* v. *Hitchcock*, 187 U.S. 553, 565), the district court correctly sustained the constitutionality of these statutes.

CONCLUSION

The judgment of the district court should be affirmed insofar as it upholds the constitutionality of 25 U.S.C. 1181-1186 and 25 U.S.C. (Supp. IV) 1291-1297.

Respectfully submitted.

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MAY 1976.